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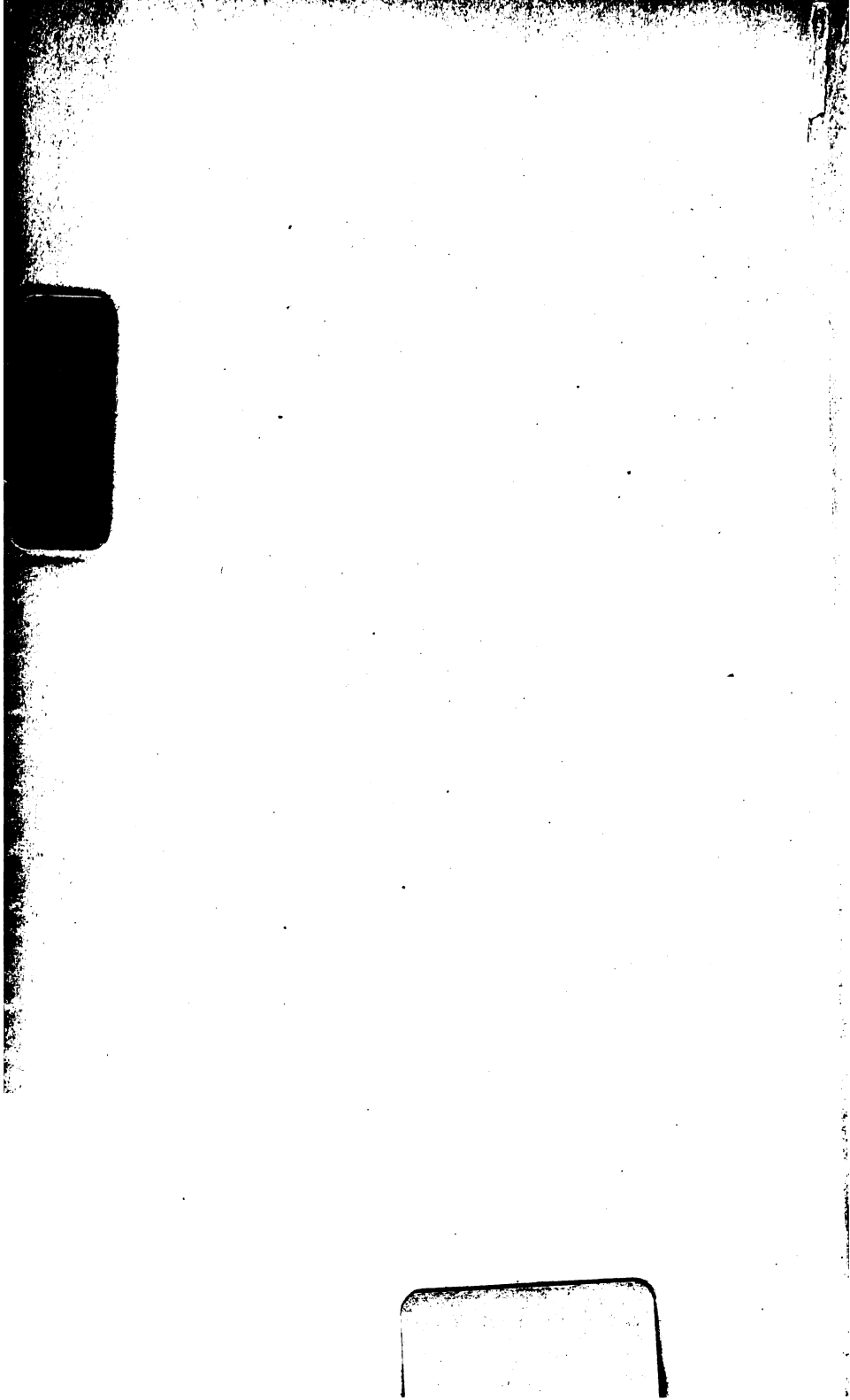
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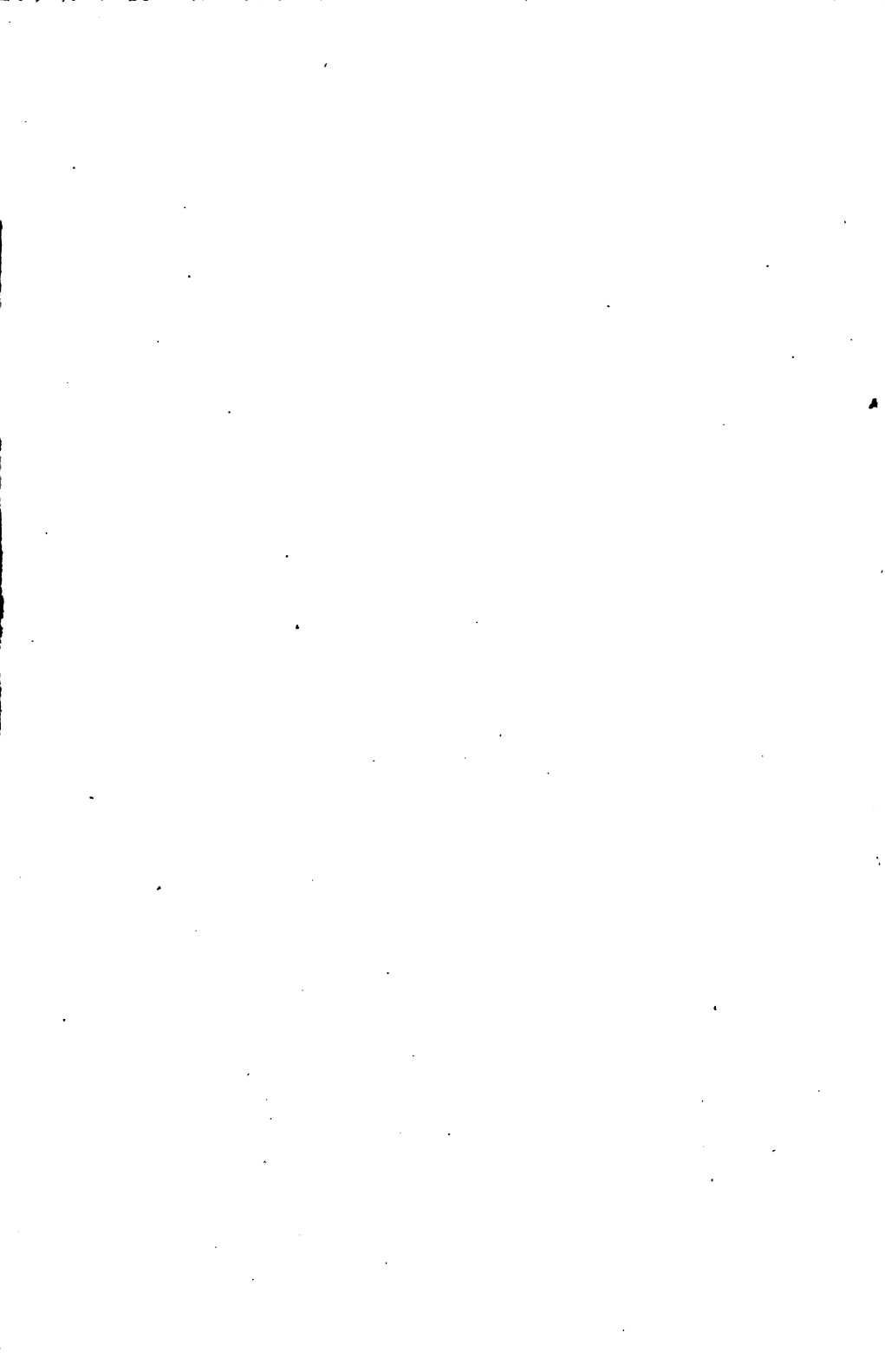
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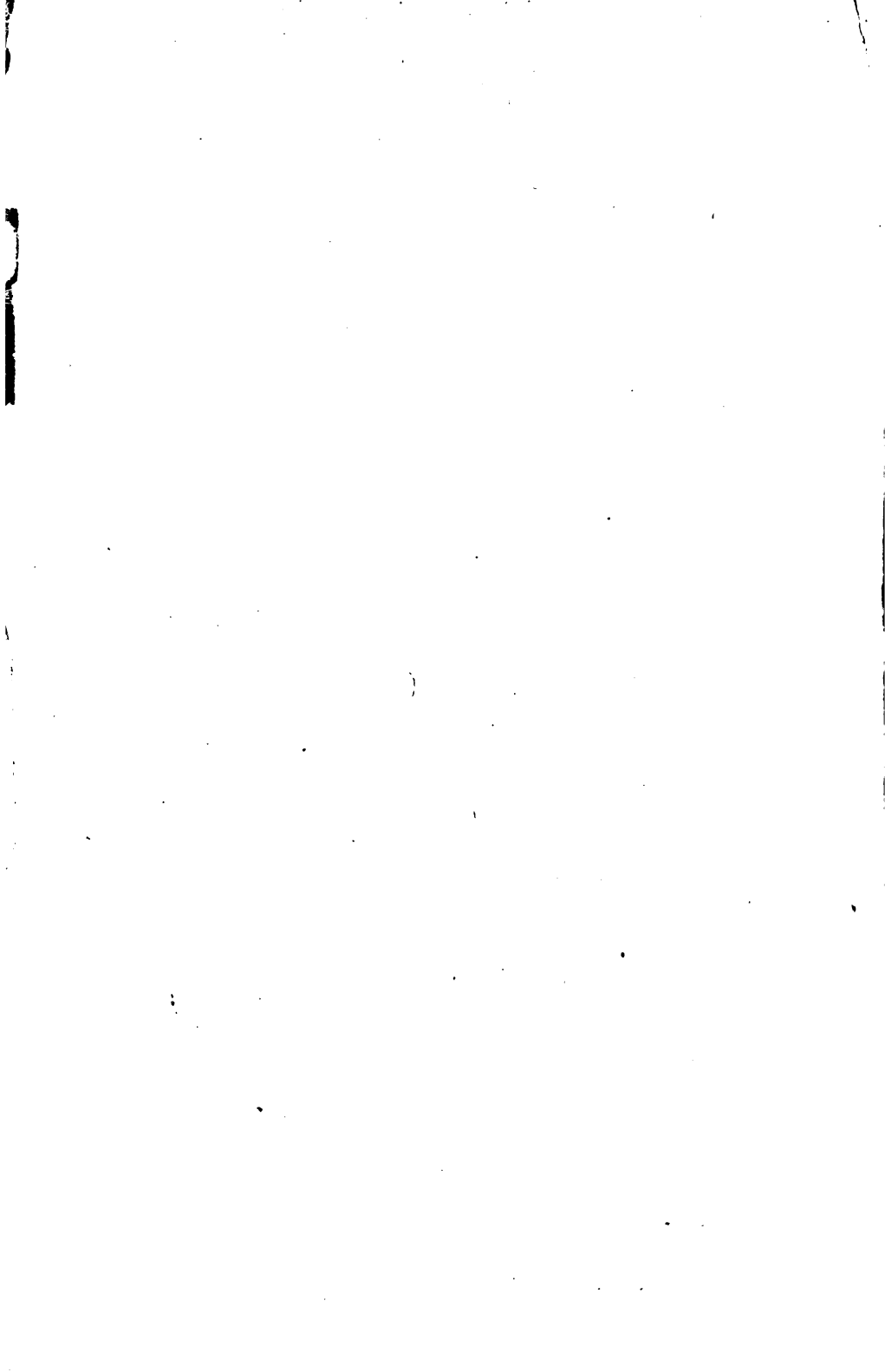
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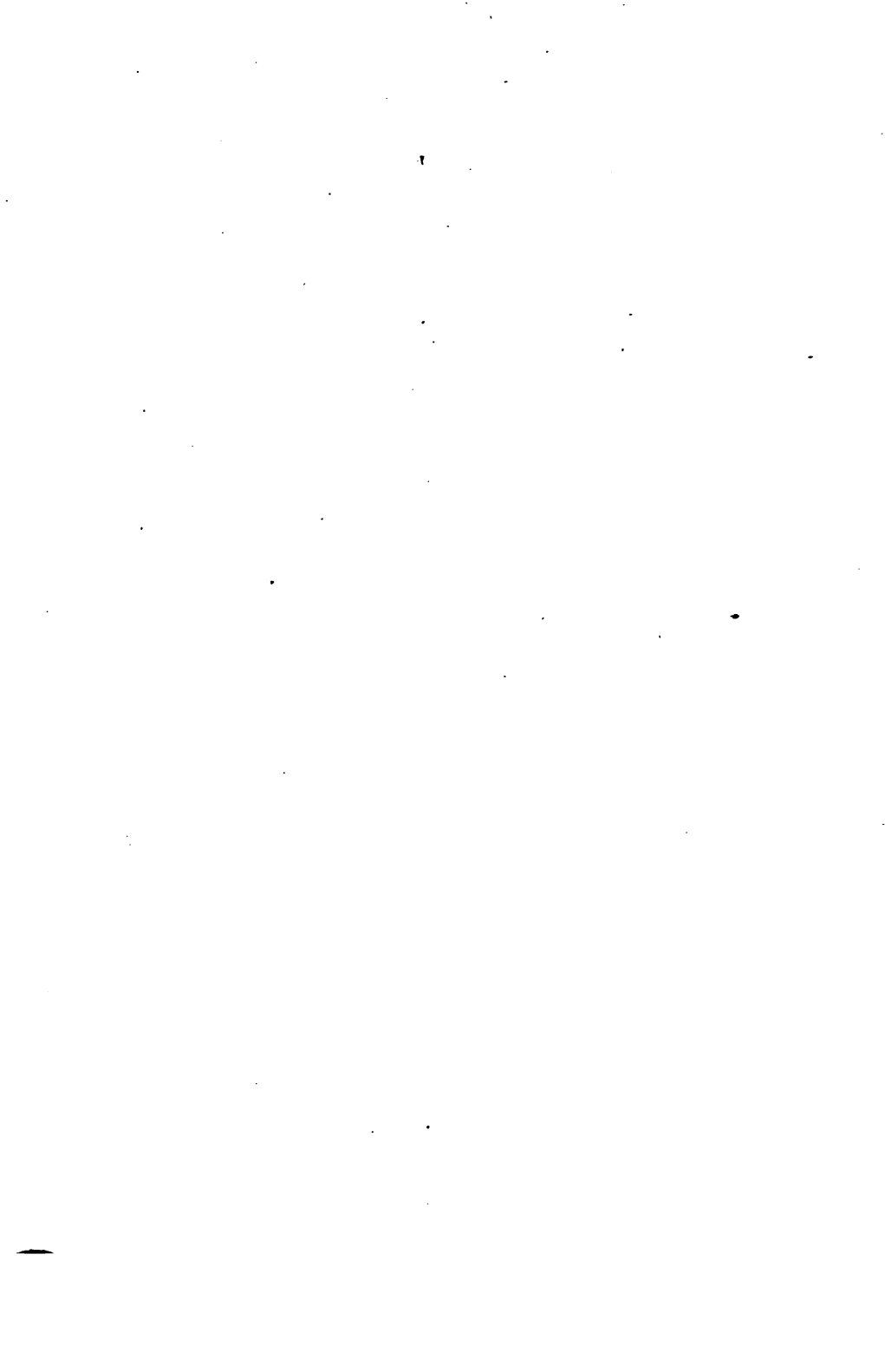
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THE INSTITUTES OF CAPE LAW



D. W. R. Risschop.

THE
INSTITUTES OF CAPE LAW

BEING
A COMPENDIUM OF THE COMMON LAW, DECIDED
CASES, AND STATUTE LAW OF THE COLONY
OF THE CAPE OF GOOD HOPE

BOOK I.
THE LAW OF PERSONS.

*mirrored in the
first edition*
BY
SIR A. F. S. MAASDORP, Kt., B.A. LONDON,
Chief Justice of the Orange River Colony.



SECOND EDITION.

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PREFACE.

THE greatest difficulty which confronts the beginner in entering upon the study of the laws applicable to the Colony of the Cape of Good Hope is the absence of a recognized handbook, containing the outlines of our common law, corrected and brought up to date in a compendious form. The handbooks of Grotius, Van Leeuwen, Van der Keessel, and Van der Linden, though invaluable as books of reference and from an historical point of view, have, owing to local legislation and other circumstances, become to a great extent obsolete and out of date as a connected guide to the beginner and the practical lawyer. The student consequently finds himself, upon the very threshold of his subject, involved in a maze of conflicting text-books, statutes, and judicial decisions, and the object of the present work is to act as a guide in that labyrinth, without making any pretence at original research or at taking the place of or superseding any of the above text-books. It merely aims at being a compendium, in a more or less readable form, of the law as laid down in Voet's Commentary on the

Pandects, the text-books of Grotius, Van Leeuwen, and Van der Linden, the Theses of Van der Keessel, and the Notes of Schorer, elucidated, corrected, and brought up to date by reference to the statute law of the Colony and the decisions of the various South African Courts.

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LIST OF ABBREVIATIONS.

Buch.	Buchanan's Supreme Court Reports.
Buch. App. C.	Buchanan's Reports of the Appeal Court Cases.
C.	Justinian's Code.
Cape Times	The Cape Times Reports.
Const.	Justinian's Constitutions.
D.	Justinian's Digest.
E. D. C.	Reports of the Eastern Districts Court.
Foord.	Foord's Supreme Court Reports.
G.	Grotius' Introduction to Dutch Jurisprudence.
Groen.	Groenewegen's footnotes to Grotius' Introduction to Dutch Jurisprudence.
Groen., De Leg.	Groenewegen's De Legibus Abrogatis.
H. C.	Reports of the High Court of Griqualand West.
Hertzog	Reports of the High Court of the South African Republic for 1893. Translated by Leonard and Kotze.
Kotze	Chief Justice Kotze's Reports of the High Court of the Transvaal Province from 1877 to 1881.
Lybrecht	Lybrecht's Redenerend Vertoog over't Notaris Ampt.
Menzies	Menzies' Reports of the Supreme Court.
Novel.	Justinian's Novels.
Off. Rapp.	Official Reports of the High Court of the South African Republic from 1894 to 1897. In the Dutch original.
Off. Rep.	Ditto. English Translation.
R. Obs.	Rechtsgeleerde Observatien.
Roscoe	Roscoe's Reports of the Supreme Court.
S. Af. Rep.	Reports of the High Court of the South African Republic. Vol. i., from 1881 to 1884, by Chief Justice Kotze; vol. ii., from 1885 to 1888, by Kotze and Barber.
S. C.	Reports of the Supreme Court by Juta and others.
Schorer	Schorer's Notes to Grotius' Introduction to Dutch Jurisprudence, to be found in the Appendix to Maasdorp's Translation of that work.
Searle	Searle's Reports of the Supreme Court.
T. S.	Reports of the Supreme Court of the Transvaal.
V. D. K.	Van der Keessel's Selected Theses.
V. D. L.	Henry's Translation of Van der Linden's Institutes of the Laws of Holland.
V. L.	Van Leeuwen's Roman Dutch Law, translated by Chief Justice Kotze.
V. L., C. F.	Van Leeuwen's Censura Forensis.
Voet	Voet's Commentarius ad Pandectas.
Watermeyer	Watermeyer's Supreme Court Reports for 1857.

N.B.—Where Book III. of this work is referred to in this volume, it is the first edition of that book which is meant.

INTRODUCTION.

THE object of this present work is to lay before the beginner an outline of the common law of the Colony of the Cape of Good Hope in the form to which it has been reduced by legislative enactments and by the decisions of the superior Courts of the Colony, and at the same time to afford to the practical lawyer a means of easy access to the authorities, on the subjects treated of, contained in our principal text-writers and in the decided cases in our Courts. The work has been styled "The Institutes of Cape Law," but, it is almost unnecessary to state, is not intended to deal with public law or the law of political conditions on the one hand, or with criminal law on the other. The subject of this work is the legal civil rights of persons in their private or non-political capacity,¹ but the subject of legal procedure will at the same time be dealt with incidentally whenever this is necessary for the proper elucidation of the matter in hand.

All legal rights are divided by the text-writers into two classes, namely, rights *in rem*, and rights *in personam*.² This classification is based upon the Roman law division of the legal remedies required for the enforcement of rights into actions *in rem* and actions

¹ G. 1 : 2 : 23 ; V. L., vol. 1, p. 2.

² Voet, 5 : 2 : 1.

in personam ; that is to say, into actions for the recovery of a particular *thing* or the enforcement of real rights to a particular *thing* which we allege to belong to us, and actions to compel a particular *person* to do something or to carry out a contract entered into by him or to pay compensation for some wrong done by him.³ Looked at from this point of view, the above classification would seem to be sufficiently exhaustive, inasmuch as any right that can possibly arise is capable of being enforced by one or other of these remedies. It must be observed, however, that this classification takes into account only those rights in which two persons at most are concerned, namely, the person to whom a right belongs and the person who owes a corresponding duty, and which may therefore be dealt with freely by those two persons by mutual consent ; but it leaves out of sight, or, at any rate, does not give prominence to a class of rights in which a third party is concerned, and which cannot therefore be dealt with freely by the two persons immediately interested without the consent of such third party. This third party is the State, and the rights referred to are those comprehended in the aggregate of rights and duties represented by the term *status*.

The term *status* in its most complete signification may be defined as those rights and duties of a free male citizen of full age, which he cannot dispose of or rid himself of without the consent of the sovereign or legislative authority of the State. The term, however, is applied also to certain portions or modifications of those rights and duties. Thus we speak of the *status* of a free man, for no one can deprive himself of his natural freedom, by selling himself as a slave, for

³ G. 3: 1: 1.

instance. The *status* of citizenship, again, may be lost, indeed, on certain grounds, in accordance with specific enactments on the subject, but cannot be disposed of by the person to whom it attaches, and whilst it exists, the rights and duties comprised in it cannot be altered or modified in any way, except by the legislative authority of the State. The *status* or modification of *status* which is the result of marriage, again, though it has its origin in the consent of the parties to the contract of marriage, cannot, when once established, be altered by the mere consent of the parties. So also the *status* or defect of *status* which is due to minority is entirely under the control of the State; whilst the modification of *status* attaching to the female sex, though it has been largely whittled away by modern legislation and modern modes of thought, is still recognized by our law.

The presence of this third party, the State, in all matters appertaining to *status*, introduces a disturbing element into the discussion of legal rights and duties, which it is necessary to consider and dispose of before entering upon the detailed consideration of rights *in rem* and rights *in personam* respectively.

It is therefore proposed to divide this little work in the first place into three Books, dealing respectively (1) with the law of persons and personal *status*, (2) with the law of things and rights *in rem*, and (3) with the law of obligations or rights *in personam*. Books I. and II. form the first two volumes of this work. The subject of Book III., however, naturally divides itself into two branches, namely, into those obligations which arise out of contract or quasi-contract, and those which are based on delict or quasi-delict; and, owing to the largeness of the subject, it has been found necessary to

publish it in two parts. The Law of Contracts therefore forms the subject of the third volume, whilst the law with regard to wrongs or delicts and quasi-delicts will be reserved for a fourth volume, in which the work will be concluded with a disquisition on the Dissolution of Obligations generally.

THE INSTITUTES OF CAPE LAW.

BOOK I.—THE LAW OF PERSONS.

CHAPTER I.

PERSONS.

IN its primary signification the term “person” is confined to individual human beings, with reference to their capacity for having or being the subject of legal rights and duties; but by a more extended signification it has also been applied to various groups of men, who are spoken of in law as imaginary, fictitious, or juristic persons, to distinguish them from human persons, who are called natural or real persons.

It is essential to the character or position of a real person that he be a being born of a woman, and endowed with the qualities and characteristics which are recognized as constituting a human being, though he may be more or less deficient in one or other of them; and consequently monsters are not regarded as persons.¹ He must be actually born alive, though he need not necessarily be capable of any long-continued existence; but even an unborn infant, provided it is afterwards actually born, is sometimes, by a legal fiction, regarded as already born, in so far as such presumption will be for its benefit,² but not where it would be to its

¹ Voet, 1: 6: 13; G. 1: 3: 5.

² Voet, 39: 5: 12. Amongst other things, when a woman who is pregnant has been condemned to death,

disadvantage.³ This fiction, however, is only intended for the benefit of the unborn infant itself, and ceases when it would only be for the benefit of a third party.⁴

The idea represented by the word "person" is to be found in its fullest and most complete form in a human being of the male sex who is in possession of his freedom, legitimate by birth, of full age, and in possession of all his faculties, and, it might be added, unmarried.⁵ The sum total of all these qualities is what is spoken of as his *status*,⁶ and any defect or alteration in any one of these particulars would at once bring about an alteration in his *status*. It will make a difference also whether such a person is considered in his own personal capacity or as the representative or executor of a deceased person, which capacity is a creature of our statute law.

As regards the difference of sex, our law does not, as a general rule, draw any great distinction between a man and a woman. Such distinctions as do exist have reference mainly to rights under public or political law, such as the right to the franchise,⁷ and the extent or mode of punishment to which they are liable for crime,⁸ both of which subjects fall outside the scope of this work. Some distinctions between men and women, however, still obtain even in the domain of private law. Thus the age of puberty differs in the case of man and woman, being fourteen years for the former and twelve for the latter. A woman also is, as a general rule, incompetent to be a surety,⁹ whether

the punishment will not be carried out until after the birth of the child (Voet, 1: 5: 5).

³ Voet, 1: 5: 5; G. 1: 3: 4; V. D. K., Th. 45.

⁴ Voet, 1: 5: 5.

⁵ V. D. L. 70.

⁶ *In re Hercules Sandenbergh*, 2 Menzies, 356; Voet, 1: 5: 1.

⁷ Constitution Ordinance, sec. 8; Voet, 1: 5: 1; V. L., vol. 1, p. 41.

⁸ Voet, 1: 5: 1.

⁹ *Oak v. Lumsden*, 3 S. C. 144; *Zeederberg v. Union Bank*, 3 S. C.

for her husband or a third party, and, when married, is in the position of a minor under the guardianship of her husband, and consequently incompetent, amongst other things, to be appointed curator to her husband's person, in case he should become of unsound mind, though she may be appointed curator of his property.¹⁰

A person becomes of age when he attains the age of twenty-one years,¹¹ and, until he does so, is subject to certain disabilities or incapacities in the eye of the law, as also are persons of unsound mind and persons labouring under any other infirmity which necessitates their being placed under curatorship, all which will be treated of under the headings of "guardianship" and "curatorship."

Besides the age of majority, the age of puberty, which is twelve for girls and fourteen for boys,¹² and that of the termination of infancy—that is, seven years—are also of importance in some respects. Thus a child under the age of puberty may not marry, and also labours under certain incapacities as regards criminal responsibility; for whilst an infant, that is, a child under seven years of age, is presumed to be absolutely incapable of committing a crime, which presumption cannot be rebutted by evidence to the contrary,¹³ the same presumption, though it applies equally to children

295; *Mackie, Dunn and Co. v. McMaster*, 4 S. C. 212; *Marico Board of Executors v. Auret*, 14 S. C. 445; *Alport's Executors v. Alport*, 16 S. C. 317; *Whitaker v. Stewart*, 18 S. A. L. J. 56; *Watson and Co. v. De Wit*, 18 S. A. L. J. 191; *Auret v. Hind*, 4 E. D. C. 283; *Whitnall v. Goldschmidt*, 3 E. D. C. 314; *Mahadi v. De Kock and Hyde*, 1 H. C. 344; Voet, 1: 5:

1; 16: 1: 12; G. 3: 3: 14-18.

¹⁰ *In re De Jager*, 6 Buch. 228; Voet, 27: 10: 10; 23: 2: 48; G. 1: 11: 7; Schorer, Note 47; V. D. K., Th. 168.

¹¹ Ord. 62, 1829, sec. 1; Voet, 4: 4: 1.

¹² Voet, 4: 4: 1.

¹³ *The Queen v. Lourie*, 9 S. C. 432; *The Queen v. George and others*, 2 E. D. C. 392.

between the ages of seven and fourteen, is liable to be rebutted.¹⁴

The fact that a person is a citizen or subject, on the one hand, or a foreigner or alien, on the other, will not affect his capacity for having or being subject to legal rights and duties, at any rate, in so far as private or non-political law is concerned.¹⁵ The question which is of much more importance, and one which permeates the whole subject of legal rights, is that of domicile, for on it will often depend the question as to whether a particular case is to be decided by the law of this Colony or according to that of some other country. In questions of personal *status*, for instance, such as whether a person is legitimate or illegitimate by birth, whether he is of age or a minor,¹⁶ whether he is sane or of unsound mind, whether he is married or single, it is the law of the domicile which will, as a general rule, have to be followed.¹⁷

Domicile must not be confounded with mere residence. It is residence, but it is something more, its essential characteristics being residence combined or connected with an intention of permanently remaining at the place of residence (*animus remanendi*); in other words, a man's domicile is the place or country in which he lives and which he regards as his permanent

¹⁴ *The Queen v. Lourie*, 9 S. C. 432; *The Queen v. Albert*, 12 S. C. 272; *The Queen v. Slinger and another*, 4 E. D. C. 279; Voet, 27: 10: 9.

¹⁵ Act 2, 1883, sec. 2; Act 37, 1861, sec. 4; Voet, 1: 5: 2; G. 1: 13; V. D. K., Th. 173; V. L., vol. 1, pp. 67 and 73; V. D. L. 66. See also *Assue v. Curator of Assue*, 2 Menzies, 148.

¹⁶ Voet, 4: 1: 29.

¹⁷ *In re Hercules Sandenbergh*, 2 Menzies, 356; *Greeff v. Verreaux*, 1

Menzies, 151.

The writer is aware that the inclusion of doctrines of private international law in a treatise on the municipal law of any particular State is irregular and unscientific, but has, nevertheless, inserted them throughout this work whenever there has been a judicial decision or a *dictum* of any of the text-writers on the subject in hand, in order to make it as exhaustive as possible of the decisions of our Courts and of the writings of those text-writers.

home.¹⁸ This permanent home is either the domicile which he receives at birth, and which is spoken of as his *domicile of origin*, or one which is acquired by him afterwards by his own act and which is known as his *domicile of choice*.¹⁹

A person's domicile of origin is, as a general rule, the place where he was born,²⁰ but children, as a rule, have the domicile of their father,²¹ and consequently, at any rate whilst they are minors, they follow the domicile of their father whenever he makes a change of domicile, provided that the interests of such minors are not prejudicially affected by such change.²²

The domicile of choice is that which a man acquires by his own voluntary act. And here it must be premised that when once a man has had an established domicile, whether it be one of origin or of choice, he is presumed to retain it, until the contrary be clearly proved.²³ A domicile of choice, then, is acquired by an actual change of residence from a former domicile to some new place, with the intention of making it one's permanent home; that is to say, there must be both actual residence at the new place and at the same time an intention of permanently remaining there (*animus manendi*). Both of these elements must be present, or there will be no change of domicile. A mere intention or declaration of intention will not be enough without actual change of residence, nor will a mere change of residence without the intention of

¹⁸ *Weatherley v. Weatherley*, Kotze, 66; Voet, 5: 1: 92; 26: 5: 2; 38: 17, Summary, sec. 34.

¹⁹ *Mason v. Mason*, 4 E. D. C. 337.

²⁰ Voet, 5: 1: 97.

²¹ *Mason v. Mason*, 4 E. D. C. 347; V. L., vol. 1, p. 71; C. 10: 38: 3; D. 50: 1: 17: 11.

²² *Hull v. McMaster*, 5 Searle, 225; Voet, 5: 1: 92, 100.

²³ *Mason v. Mason*, 4 E. D. C. 337; *West and another v. Carpenter*, 1 Roscoe, 437; *Adams v. Adams*, 2 S. C. 24; *Harrop v. Harrop*, 19 E. D. C. 341.

making a permanent home at the new abode.²⁴ The fact of residence is a matter which will have to be proved in the ordinary way, and the nature of the intention will have to be gathered both from the statements of the person making the change and from all the surrounding circumstances.²⁵ The change of domicile, however, must be made *bond fide*, and not with any fraudulent intent; ²⁶ and it must also be voluntarily and freely made, and not prescribed or dictated by any external necessity, such as the duties of public office, the pressure of creditors, or purposes of health.²⁷

A choice of domicile is made by a woman in an indirect manner when she marries, for by marriage she acquires the domicile of her husband, and loses for the future all right or power of selecting a domicile for herself as long as the marriage subsists, such choice being entirely made over to the husband.²⁸

No one can in law be without a domicile,²⁹ and therefore, if a person abandons his domicile of origin, he does not thereby lose such domicile, but retains it until he acquires a new domicile of choice. His domicile of choice, however, a person may lose by mere abandonment, provided such abandonment is complete and irrevocable; but in that case he is not without a domicile, but reverts to his domicile of origin.³⁰

²⁴ *Weatherley v. Weatherley*, Kotze, 66; Voet, 5: 1: 98; *Mills v. Executors of Mills*, 18 S. C. 182; *Lotter v. Solaman*, 19 S. C. 158.

²⁵ *Reeves v. Reeves*, 1 Menzies, 249; *Hull v. McMaster and others*, 5 Searle, 224; *Adams v. Adams*, 2 S. C. 24; *Hawkes v. Hawkes*, 2 S. C. 109; *Whipp v. Whipp*, 12 S. C. 174; *Pieters v. Pieters*, 16 S. C. 303; *Mason v. Mason*, 4 E. D. C. 337; Voet, 5: 1: 92, 97, 98.

²⁶ *Hull v. McMaster and others*, 5 Searle, 224.

²⁷ *Udney v. Udney*, L. R., 1 H. L.

Sc. 458; *Weatherley v. Weatherley*, Kotze, 66; *Hennings's Executor v. The Master*, 3 S. C. 235; Voet, 5: 1: 93, 98; 38: 17, Summary, sec. 34; V. L., vol. 1, p. 71.

²⁸ *Reeves v. Reeves*, 1 Menzies, 224; *In re Miller*, 3 Searle, 227; *Whipp v. Whipp*, 12 S. C. 174; *Pieters v. Pieters*, 16 S. C. 303; *Mason v. Mason*, 4 E. D. C. 330; Voet, 5: 1: 95, 101; 23: 4: 20; 24: 2: 13. But see V. D. K., Th. 228; Schorer, Note 100.

²⁹ *Mason v. Mason*, 4 E. D. C. 337.

³⁰ *Ibid.*, 4 E. D. C. 330; *Udney v.*

It is not impossible under our law for a man to have two domiciles.³¹

The term domicile is also used in a technical sense to denote the place chosen by a litigant as the place where legal notices are to be served upon him, and which is spoken of as his *domicilium citandi*.³²

The next subject to be considered in connection with persons is that of relationship.

Relationship has its origin either in consanguinity or in affinity.

Consanguinity consists in relationship by blood or by descent from a common ancestor, whether male or female.³³ Affinity is that tie which subsists between persons who are not so related, but are connected merely through the marriage either of themselves or of their blood relations.

Consanguinity is either direct or collateral.³⁴

The direct line of consanguinity is that which subsists between a man and his father or other ascendants, and between a man and his children or further descendants,³⁵ whilst the collateral line is that which subsists between all the descendants of a common ancestor who are not related to each other in the direct line.³⁶

All the descendants of a common ancestor are spoken of in our law as his *stirps*, each *stirps* being liable to be split up into further *stirpes*, according as a man's children or further descendants become in their turn the heads of families. The division of families into *stirpes* is of special importance in the matter of succession, and more especially of succession *ab intestato*.

Udney, L. R., 1 Sc. A. 441; Voet, 5: 1: 92.

³¹ *Mason v. Mason*, 4 E. D. C. 347; Voet, 5: 1: 92.

³² Voet, 5: 1: 93, 94.

³³ *Ibid.*, 23: 2: 29.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ V. L., vol. 1, p. 53.

The nearness of relationship is computed in degrees, every step in the line of direct descent being called a degree, a man being related to his son in the first degree, to his grandson in the second, and so on *ad infinitum*.³⁷ The degrees of collateral relationship subsisting between any two persons are computed by counting the number of degrees of direct relationship between each of them and their common ancestor, and then adding the two amounts together. Thus two brothers, being each in the first degree of descent from their father, are related to each other in the second degree; an uncle and his nephew are related to each other in the third degree; two first cousins in the fourth degree, and so on *ad infinitum*.³⁸

Blood-relationship or consanguinity is either legitimate or illegitimate. Legitimate relationship is that which arises out of procreation by two persons who have been duly married according to law, and illegitimate relationship that which has its origin in sexual intercourse without such legal marriage, children born in wedlock being called legitimate, and those out of wedlock illegitimate children.³⁹ It is not, however, essential to the legitimacy of a child that it shall have been conceived in wedlock, provided only that it be born after marriage;⁴⁰ and all the children of a married woman are presumed to be legitimate and to be the children of her husband, according to the maxim, "*Pater est quem nuptiæ demonstrant*," until the contrary be clearly and distinctly proved in an action at law.⁴¹

³⁷ Voet, 23: 2: 29; V. L., vol. 1, pp. 46, 47.
p. 53.

³⁸ Voet, 23: 2: 29; V. L., vol. 1, p. 54.

³⁹ G. 1: 12: 1, 2; V. L., vol. 1, pp. 46, 47.
⁴⁰ V. D. K., Th. 169.
⁴¹ G. 1: 12: 3; Schorer, Notes 49 and 50; V. D. K., Th. 170; V. L., vol. 1, p. 46.

Illegitimate children are by our text-writers divided into the following classes, namely, (1) *natural* children, that is, such as are born in a state of concubinage; (2) *spurious* or ordinary illegitimate children, that is, such as are the result of mere promiscuous intercourse unaccompanied by any aggravating features;⁴² (3) *adulterine* children, or children born in adultery; and (4) *incestuous* children, or such as are born in incest or as the result of sexual intercourse between persons who are forbidden to marry on the grounds of too close relationship.⁴³

Of these four classes our law makes no distinction between natural and ordinary illegitimate or spurious children, concubinage not being recognized amongst us in any way;⁴⁴ but adulterine and incestuous children labour under certain disabilities as to the right of succession, which will be noticed further on in their due place. Ordinary illegitimate children, who do not labour under these special disabilities, are regarded as having no father,⁴⁵ except in so far as their right to maintenance is concerned (the father as well as the mother being responsible for the maintenance of an illegitimate child);⁴⁶ but in relation to the mother and the mother's blood-relations they are in exactly the same position as her legitimate children, according to the maxim of the Roman-Dutch law: "*Een moeder maakt geen bastaard*" (A mother makes no bastard).⁴⁷

Illegitimate children can, with us, be legitimated in only one way, that is, by the marriage of their

⁴² G. 1 : 12 : 4, 5.

⁴³ G. 1 : 12 : 6; Schorer, Note 48, V. L., vol. 1, p. 47.

⁴⁴ Voet, 25 : 7 : 3; G. 1 : 12 : 5; Schorer, Note 51.

⁴⁵ V. L., vol. 1, p. 47.

⁴⁶ *Ex parte Lievengeld*, 4 S. C. 64; *Kramer v. Findlay's Executors*, 8

Ruch. 51; Voet, 38 : 17; Summary, sec. 8, and 25 : 3 : 6.

⁴⁷ *Mugamat Jassiem and others v. The Master and another*, 8 S. C. 259; Voet, 38 : 17; Summary, secs. 8, 19, and 21; G. 2 : 27 : 28; Schorer, Notes 185 and 187; V. L., vol. 1, pp. 47, 425; V. D. L. 93 and 165.

parents subsequent to their birth,⁴⁸ in which case the children are regarded as in all respects in exactly the same position as children legitimate by birth.⁴⁹

It is true that another mode of legitimation is mentioned by our text-writers, namely, by Act of the Legislature;⁵⁰ but this has become obsolete with us, and is hardly likely to be resorted to at the present day, though there is, of course, nothing to prevent the Parliament from passing an Act of Legitimation, if requested so to do.

Affinity is the connection or relationship subsisting between a man and the blood-relations of his wife, and between a woman and the blood-relations of her husband, and is based upon the fiction that husband and wife are one, and that whoever is related to the one is also related to the other.⁵¹

The degrees of affinity are computed in a similar way to the degrees of consanguinity, but are of no legal importance,⁵² the only question which is of any practical importance at the present day being whether the affinity is in the direct or collateral line.

CHAPTER II.

MARRIAGE.

MARRIAGE is a contract between a man and a woman to live together for life as man and wife to the exclusion of all other men and women.¹ But though

⁴⁸ G. 1: 12: 9; V. D. K., Th. 171; V. L., vol. 1, pp. 49, 51; V. D. L. 94.

⁴⁹ G. 1: 12: 9.

⁵⁰ G. 1: 12: 9; Schorer, Note 53; V. D. K., Th. 172; V. L., vol. 1, pp. 49, 50; V. D. L. 94.

⁵¹ Voet, 23: 2: 29.

⁵² *Ibid.*; V. L., vol. 1, p. 58.

¹ *Bronn v. Frits Bronn's Executors*, 3 Searle, 322; *Horak v. Horak*, *ibid.* 396; *Weatherley v. Weatherley*, Kotze, 71; Voet, 23: 2: 1, 65; V. D. L. 71; 1 Menzies, 143. See also *Hyde v. Hyde and Woodmansee*, L. R., 1 P. & M. 130; *Bethell v. Bethell and Hildyard*, 38 Ch. D. 220.

it is a contract, it is a contract of a very special kind, inasmuch as though it may, like all other consensual contracts, be constituted by the consent of the parties, testified and confirmed by certain solemnities required by law, it differs from other consensual contracts in that it cannot be again dissolved by such consent. The reason for this difference is that the marriage contract creates or gives rise to a "status" or civil institution in which two contracts are practically involved, namely, the express contract between the parties, and a tacit contract between them on the one hand and the State on the other, providing that they shall not have the power of dissolving the union formed between them before the death of one or other of them, and that the State alone shall have the right of dissolving it through its tribunals in accordance with certain fixed principles of policy and justice.²

The celebration of marriage is usually preceded by a betrothal, or promise or engagement of marriage, which in early times was attended with considerable solemnities, but at the present day may be contracted in any of the many ways in which the consent of parties to a contract may be conveyed, whether by word of mouth, by letter, or message.³ Such consent may be vitiated, just as in the case of any other contract, by fraud, error, duress, drunkenness, etc.⁴

A promise of marriage may be conditional, provided that the condition be not impossible or *contra bonos mores*, and in that case the obligation to marry will not arise until the condition has been fulfilled.⁵ A condition may, however, be waived either expressly or tacitly, unless it involves one of the essentials of

² *Bronn v. Frits Bronn's Executors*, 3 Searle, 322.

³ Voet, 23: 1: 1; 1 Menzies, 144.

⁴ Voet, 23: 1: 4, 15.

⁵ Voet, 23: 1: 6, 10-15.

marriage, such as the consent of parents in the case of minors.⁶ Impossible or immoral conditions render a betrothal void, it being regarded as not seriously contracted.⁷

Whoever is competent to marry may also make a valid promise of marriage, but the converse of this is not true, for children under the age of puberty may validly be betrothed with the consent of their parents, but cannot marry until they have attained that age.⁸

Minors may only enter into betrothals with the consent of their parents or guardians, any promise to marry made without such consent being *ipso jure* null and void, and giving rise to no binding obligation to marry nor to any right of action.⁹

The immediate consequences of a betrothal is the obligation to marry within a reasonable time,¹⁰ and failure to do so or a breach of promise of marriage gives rise to an action of damages. In former times the injured party had the option of either suing in damages or for specific performance of the contract, that is, for an order compelling the other party to enter into the marriage,¹¹ but the latter action has been abolished by the Marriage Order in Council of September 7, 1838, and the action for damages is the only remedy now left.¹² Such an action will even lie against the executor of a deceased person who has wrongfully delayed contracting the marriage and then died before it could be contracted.¹³ A plaintiff,

⁶ Voet, 23: 1: 6.

⁷ Voet, 23: 1: 8.

⁸ Voet, 23: 1: 2.

⁹ *Gray v. Rynhoud*, 1 Menzies, 150; *Greeff v. Verreux*, *ibid.* 153; Voet, 23: 1: 5, 6, 17 and 20.

¹⁰ Voet, 23: 1: 12.

¹¹ *Richter v. Wagenaar*, 1 Menzies,

262; *Joosten v. Grobbelaar*, *ibid.* 149; *Greeff v. Verreux*, *ibid.* 151; Voet, 23: 1: 12.

¹² Order in Council, Sept. 7, 1838, secs. 19 and 20; *Van Staaden v. Kocks*, 4 E. D. C. 24; *Hannah Hart v. Myer Yates*, 3 Off. Rep. 201.

¹³ Voet, 23: 2: 95.

wife
promised

however, who had notice that his or her betrothed was about to marry a third party, and allows the marriage to go through without protesting, loses his or her right of action.¹⁴

A promise to marry implies a warranty against past or future unchastity and any other defect, such as impotence, which is inconsistent with the objects of marriage, as also against any infectious disease, such as leprosy or syphilis.¹⁵ Consequently, if either of the parties, either before or after the promise of marriage, has been or is guilty of unchastity, the other party may cancel the promise.¹⁶ There is, however, no implied warranty that the woman is a virgin, provided that the loss of her virginity is not due to any voluntary act of unchastity on her part, the fact of her being a widow, or of her having been or being subsequently raped, not giving any ground for the cancellation of the promise.¹⁷

CHAPTER III.

THE ESSENTIALS OF MARRIAGE.

CERTAIN essential requisites for the validity of every marriage are laid down by our law, as well as by that of every other civilized country. The question whether these requisites have been complied with in any particular case—in other words, whether a valid marriage has been contracted—will, in accordance with the accepted principles of private international law, have to be decided according to the law of the place where such marriage was celebrated. Any

¹⁴ V. D. K., Th. 85.

¹⁵ Voet, 23: 1: 15.

¹⁶ *Hebe v. Mdelwa*, 12 E. D. C.

6; Voet, 23: 1: 6, 13, 14.

¹⁷ Voet, 23: 1: 14.

marriage lawfully contracted according to the law of the place where it was celebrated will be recognized everywhere, provided it was not contracted in fraud of the laws of the country where either of the parties was domiciled at the time.¹

The main essentials to the validity of a marriage according to our law is that the parties shall be competent to marry, and that the marriage shall be celebrated in terms of the solemnities required by law.

With respect to the competency to marry, it may be premised as a general rule that all persons, male or female, are competent to marry who are not hereinafter declared to be incompetent.

Persons may be incompetent to marry either absolutely or only relatively to certain other persons.

Children under the age of puberty—that is, boys under fourteen and girls under twelve years of age—are absolutely incompetent to marry,² as also are persons of unsound mind, at least whilst such unsoundness continues, and persons suffering from a permanent and incurable incapacity to procreate children.³

Persons are incompetent to marry relatively to others owing either to too close consanguinity or blood-relationship, or to too close affinity or relationship by marriage, subsisting between them.⁴

The following are forbidden to marry, on the grounds of too close consanguinity :—

1. Ascendants and descendants *ad infinitum*, and without reference to degree of relationship,⁵ or to

¹ *Nggobela v. Sihela*, 10 S. C. 352.

² G. 1 : 5 : 3; Schorer, Note 9; V. D. K., Th. 66; V. D. L. 78; V. L., vol. 1, p. 40.

³ Voet, 23 : 2 : 28; G. 1 : 5 : 4; V. D. L. 78 and 79.

⁴ Voet, 23 : 2 : 29.

⁵ Pol. Ord., April 1, 1580, art. 5, 3 Groot Placaat-Boek, col. 503 (see Appendix I.); Voet, 23 : 2 : 30; G. 1 : 5 : 6.

whether the relationship is due to legitimate or illegitimate carnal intercourse.⁶

2. Collaterals of whom one at least is related to a common ancestor in the first degree of descent.⁷ Hence there can be no marriage between a brother and sister, or between a man or woman and a descendant of a brother or sister, that is, between an uncle and niece, or between an uncle and the female descendant of a nephew or niece, nor between an aunt and nephew, or between an aunt and the male descendant of a nephew or niece.

As regards affinity, marriages used formerly to be forbidden in the same degrees as in the case of consanguinity,⁸ that is, a man was forbidden to marry any blood-relation of his deceased wife, and a woman was forbidden to marry any blood-relation of her deceased husband, who was related to such deceased wife or husband within the forbidden degrees of consanguinity, or, in other words, whom, if of the opposite sex, the deceased wife or husband would have been prohibited from marrying, on the grounds of too close consanguinity.⁹

In the ascending and descending lines, this prohibition extended *ad infinitum* in the same way as in the case of consanguinity. Consequently a widower was not allowed to marry his daughter-in-law, that is, the surviving wife of a deceased son, nor the widow of a deceased grandson or other more remote descendant, nor his step-daughter, that is, the daughter of his wife by a previous marriage, nor any descendant of a step-

⁶ *Reg. v. Arends*, 1 Cape Times, 114.

⁷ Pol. Ord., arts. 6 and 7 (see Appendix I.); Voet, 23: 2: 31 and 32; G. 1: 5: 7 and 8.

⁸ G. 1: 5: 9.

⁹ Pol. Ord., April, 1580, art. 8 (see Appendix I.); *Mills v. The Assistant Resident Magistrate of the Cape*, 18 S. C. 342.

son or step-daughter.¹⁰ In the same way, a widow was not allowed to marry her son-in-law, nor the widower of a deceased grand-daughter or other more remote descendant, nor her step-son, nor any descendant of a step-son or step-daughter.¹¹

As regards collaterals again, a man, whether he was a widower or a bachelor, was forbidden to marry the widow of his deceased brother, or uncle, or grand-uncle, or other more remote ascendant collateral who was related to their common ancestor in the first degree of descent, or the widow of a nephew, or of a son or more remote descendant of a nephew or niece. A widower, again, was forbidden to marry his deceased wife's sister, or the daughter or other more remote descendant of his wife's brother or sister, or his wife's aunt or grand-aunt, or other more remote ascendant collateral who was related to the common ancestor with the wife in the first degree of descent.¹² In the same way, a woman, whether she was a widow or as yet unmarried, was forbidden to marry the widower of her deceased sister, or aunt, or grand-aunt, or other more remote ascendant collateral who was related to their common ancestor in the first degree of descent, or the widower of a niece, or of a daughter or other more remote descendant of a nephew or niece. A widow, again, was forbidden to marry her deceased husband's brother, or the son or other more remote descendant of her husband's brother or sister, or her husband's uncle, grand-uncle, or other more remote ascendant collateral who was related to the common ancestor with the husband in the first degree of descent.¹³

¹⁰ Pol. Ord., April 1, 1580, arts. 8 and 9; Voet, 23: 2: 30; G. 1: 5: 10.

¹² *Ibid.*, April 1, 1580, arts. 10 and 11.

¹¹ Pol. Ord., arts. 8 and 9.

¹³ *Ibid.*

Outside these defined limitations marriage was free, and there was nothing to prevent marriage wherever there was no consanguinity either between the person proposed to be married and the surviving widow or widower, or between such person and the predeceased spouse. Consequently there was nothing to prevent a marriage between a widower and the widow of his son-in-law, or between a widow and the widower of her daughter-in-law, or between a man and the widow of his wife's brother.¹⁴

In the case of the forbidden degrees of affinity, dispensation or permission to marry was sometimes granted by the Legislature acting as such and by means of a legislative act.¹⁵

As regards the forbidden degrees of affinity in the ascending or descending line, the law is at the present day still the same,¹⁶ but in the case of collaterals the law has been altered by Act 40, 1892, which enacts that "it shall be lawful for any *widower* to marry the sister of his deceased wife, provided such sister be not the widow of a deceased brother of such widower, or to marry any female related to him in any more remote degree of affinity than the sister of his deceased wife, save and except an ancestor of or descendant from such deceased wife."¹⁷ From this it will be noticed that the statute aims directly at the relief of *widowers* alone, and only very indirectly at the relief of *widows*, whilst the interests of *bachelors* would seem to be altogether disregarded. The Supreme Court has, however, decided that as the object of the statute is the removal of a disability, what applies to a widower ought *à fortiori* to apply to a bachelor, who has not

¹⁴ Schorer, Note 11.

¹⁵ *Loedolff and Smuts v. Robertson and others*, 4 Searle 146.

¹⁶ Act 40, 1892, Sec. 2.

¹⁷ *Ibid.*

by a previous marriage caused the affinity which is in question,¹⁸ but it has been further held that a bachelor, like a widower, is prohibited from marrying the widow of his deceased brother.¹⁹

A widower may now marry his deceased wife's sister, excepting in the case where such sister is the widow of his deceased brother.²⁰ He may, further, marry the daughter²¹ or any more remote descendant of his wife's brother or sister, as also his wife's aunt, grand-aunt, etc. It has also been decided that a man, whether he be a widower or bachelor, may marry the widow of his deceased uncle.²²

It must, however, be observed that the above alterations in the law as regards a widower only apply where the marriage has been dissolved by death, and not where it has been dissolved by a decree of divorce, it being expressly enacted by Act 40, 1892, that "nothing in this Act contained shall be deemed to legalize or render valid the marriage of a man with the sister of a wife from whom he has been divorced."²³

Marriage is further prohibited between a man and woman who have committed adultery with each other.²⁴

According to Voet, marriage is also forbidden between a ravisher and the woman ravished, and between a widow and the man with whom she conspired to murder her former husband.²⁵

Marriage was also at one time prohibited between

¹⁸ *Mills v. The Assistant Resident Magistrate of the Cape*, 18 S. C. 347.

¹⁹ *Ex parte Daniel Moody*, 21 S. C. 381.

²⁰ Act 40, 1892, sec. 2.

²¹ *Queen v. Abraham Mentoer*, 11 E. D. C. 125.

²² *Mills v. Assistant Resident Magistrate of the Cape*, 18 S. C. 342.

²³ Act 40, 1892, sec. 4.

²⁴ *Daniel v. Daniel*, 3 Juta, 231; *King v. Bezuidenkout and Lynch*, 18 E. D. C. 222; Voet, 23: 2: 27; 34: 9: 3; V. D. K., Th. 70; R. Obs., part 1, obs. 11; V. D. L. 80.

²⁵ Voet, 23: 2: 26 and 27. See also V. D. K., Th. 71 and 72.

a guardian and his female ward ; but this is no longer the case,²⁶ though the sanction of the Chief Justice, or of the Judge President of the Eastern Districts Court or of the High Court of Griqualand West, as will be shown further on, will, of course, be required to legalize such marriage.

In addition to the above general limitations to the right of marriage, certain obstacles were also placed by the Roman law and Roman-Dutch law in the way of a widow or widower who wishes to enter upon a second marriage, some of which still obtain even at the present day.

A widow or widower is by our law obliged, before entering upon a second marriage, to pay over to the Master of the Supreme Court, or to secure by deed of *Kinderbewys* the inheritances due to the minor children of the previous marriage out of the estate of the deceased spouse ;²⁷ and until this has been done no minister of religion or other marriage officer is authorized to celebrate such second marriage.²⁸

Under the Roman law a widow was prohibited from entering into a second marriage within a year from her first husband's death, which was spoken of as her *annus luctus* or year of mourning ; but with us this is not so, though it is expected that she will wait long enough before entering upon a second marriage, so as to be certain that she is not with child by her former husband.²⁹

Another restriction upon second marriage was introduced into the Roman law by the Code,³⁰ and was

²⁶ Voet, 23 : 2 : 25 and 37 ; V. L., vol. 1, p. 114 ; V. D. K., Th. 74.

²⁷ Act 12, 1856, sec. 1 ; Act 16, 1860, sec. 6 ; Act 9, 1882, sec. 6 ; *Meiring v. Master of the Supreme Court*, 19 S. C. 382.

²⁸ Ord. 105, secs. 22 and 23 ; Proclamation, May 15, 1805, sec. 14.

²⁹ Voet, 23 : 2 : 98 ; G. 1 : 5 : 3 ; V. D. K., Th. 67. and 68 ; Schorer, Note 10.

³⁰ Code, 5 : 9 : 6.

adopted by the Roman-Dutch law, in which it was generally known as the *lex hac edictali*, from the initial words of that law in the Code, but has been repealed by Act 26, 1873.³¹

Under the *lex hac edictali* a widower or widow entering into a second marriage was not allowed to give or leave to the second spouse, either by act *inter vivos* or by last will, more than was given or left to that one of the children of the first marriage, to whom least was left or given by him or her, and whatever is given in excess of this amount will have to be refunded and divided equally between the children of the first marriage.³²

In marriage, as in all other consensual contracts, the free consent of the parties is essential to the validity of the contract, and consequently where such consent is wanting, as where one of the parties was at the time of the marriage suffering from unsoundness of mind or in a state of intoxication, or where there has been an error as to the person of one of the parties or as to a substantial quality of the same, the marriage is void, or at least voidable.³³ A marriage cannot, however, be set aside on the ground of duress, or because one of the parties was compelled to enter into it through fear, it being considered that the public nature of the ceremony does away with all possibility of such duress or compulsion being used.³⁴

In the case of minors the consent of the parents or guardians is required.

As regards the parents, the consent of the mother

³¹ Also repealed in the Orange River Colony by Chapter XCII., sec. 1, of the Statute Law, and in the Transvaal by Proclamation No. 28, 1902, sec. 127.

Voet, 23 : 2 : 110 ; G. 2 : 12 : 6 ; 2 : 16 : 7 ; 3 : 2 : 24 ; Schorer, Note 101 ; V. D. K., Th. 213, 232, and 691.

³³ Voet, 23 : 2 : 6.

³² *Lucas v. Hoole*, 9 Buch. 132 ;

³⁴ *Ibid.*

as well as of the father must be obtained ; but in case of a difference of opinion between the father and the mother, the opinion of the former will have to prevail.³⁵ If the parent whose consent is required is *non compos mentis* or of unsound mind, or absent from the Colony, or otherwise incapable in law or in fact of consenting, or unreasonably and improperly withholds his or her consent to a suitable marriage, or in case both of the parents are dead, the consent of the Chief Justice, or of the Judge President of the Eastern Districts Court or of the High Court, within their respective jurisdictions, or, in the absence of one or other of these, of the Senior Puisne Judge of each Court, will have to be obtained.³⁶ The consent of the grand-parents or other blood-relations, or of the step-parents, is in no case required.³⁷

In the case of a marriage by banns before a minister of religion or magistrate, the consent of the parents may be either express or tacit, parents being presumed to have had notice of the marriage, and therefore to have consented unless they raise objections ;³⁸ but in the case of a marriage by special licence the written consent of the parents, or an order of the Chief Justice, or of one of the Judges President, or of a Senior Judge, as above laid down, will be required.³⁹ Where a marriage is forbidden by the parents or guardians, and notice of such prohibition has been given to the minister of religion, the publication of banns will be absolutely void.⁴⁰

³⁵ *Johnson v. McIntyre*, 10 S. C. 321 ; Order in Council, Sept. 7, 1838, secs. 10 and 17 ; Act 8, 1882, sec. 7 ; Voet, 23 : 2 : 13 ; G. 1 : 5 : 15 ; Schorer, Note 13.

³⁶ Order in Council, Sept. 7, 1838, sec. 17 ; *Re Wishart*, 7 E. D. C. 8 ; G. 1 : 5 : 15 and 16 ; V. D. K., Th. 76 and 80-82 ; Schorer, Notes 14 and 15 ; V. L., vol. 1, p. 104.

³⁷ Voet, 23 : 2 : 15, 16 ; Schorer, note 13 ; V. D. L. 81.

³⁸ Order in Council, sec. 18 ; Act 16, 1860, Schedule A, secs. 11 and 28 ; *Johnson v. McIntyre*, 10 S. C. 321.

³⁹ Act 9, 1882, sec. 7 ; *Johnson v. McIntyre*, 10 S. C. 322.

⁴⁰ Order in Council, sec. 10.

Under the common law of the Colony the marriage of a minor without the consent of parents or guardians was *ipso jure* null and void;⁴¹ but the law has to some extent been altered by our Statute Law, and at the present day a marriage by banns or before a Magistrate cannot, in the absence of actual fraud, be impeached for want of the consent of parents or guardians.⁴² It is different with a marriage by special licence, for if in such a case the Magistrate has by the fraud of one or both of the parties been led to believe that they are both of age, or that the consent of the parents has been given, and has thus been induced to issue a licence, the parents may still sue to have the marriage set aside, and in that case the fact that the mother of the minor was a party to the fraud will not do away with the father's right in that respect.⁴³ Such a marriage, however, though voidable, is not void, and will be regarded as valid, until it is set aside by the judgment of some competent Court.⁴⁴ Subsequent ratification also by the parent will render the marriage valid in itself, but will not do away with the penalties attaching thereto.⁴⁵

A minor who has fraudulently been inveigled into a clandestine marriage without the parents' consent, may sue for the cancellation of the marriage, provided that is done within a reasonable time after the

⁴¹ Pol. Ord., April 1, 1580, arts. 3 and 13 (see Appendix I.); *Greeff v. Verreault*, 1 Menzies, 153; *Mostert v. The Master*, 8 Buch. 83; *Bronn v. Frits Bronn's Executors*, 3 Searle, 328; *Lea v. Donlon*, 1 Cape L. J. 342; Voet, 23: 1: 3; 23: 2: 11; V. D. K., Th. 75; V. L., vol. 1, p. 103.

⁴² Order in Council, sec. 10; *Johnson v. McIntyre*, 10 S. C. 321; *Bronn*

v. Frits Bronn's Executors, 3 Searle, 327; G. 1: 5: 14; 1: 8: 3; 2: 1: 8; Schorer, Note 12.

⁴³ *Johnson v. McIntyre*, 10 S. C. 322; *Lea v. Donlon*, 1 Cape L. J. 342; *Solomon and Solomon v. Hanna*, (1903) T. S. 460.

⁴⁴ *Mostert v. The Master*, 8 Buch. 83; Voet, 4: 4: 45; 23: 2: 14.

⁴⁵ *Mostert v. The Master*, 8 Buch. 83; G. 1: 8: 3; V. D. K., Th. 75.

discovery of the fraud.⁴⁶ But mere minority at the time of the marriage will not in itself be sufficient ground for annulling a marriage.⁴⁷

The consent of guardians is not absolutely essential to the validity of a marriage, that is to say, a guardian cannot sue to have a marriage set aside because it was contracted without his consent; but it is required, in the same way as that of the parents, in order to convey to the other spouse any rights to the property of the minor.⁴⁸

As regards the property of the minor, a marriage without the consent of the parents or, in default of parents, of the guardians will have no effect to pass any rights to or over such property to the other spouse, either under our common law community of property or by virtue of any antenuptial contract entered into between the spouses.⁴⁹ It follows that, where such a marriage has been entered into without any antenuptial contract, it will be considered as being one out of community of property, at any rate in so far as such community would be to the prejudice of the minor and to the advantage of the person marrying such minor;⁵⁰ nor will the Court, as it would seem, have any authority after the marriage to make any settlement in favour of such person, even though the parents and guardians may subsequently give their consent to such course.⁵¹

The same rule applies to the case of a marriage by antenuptial contract, that is, a person marrying

⁴⁶ *Haupt v. Haupt*, 14 S. C. 39.

⁴⁷ *Voet*, 4: 4: 45.

⁴⁸ Order in Council, secs. 10 and 17; Act 9, 1882, sec. 7; *Mostert v. The Master*, 8 Buch. 83.

⁴⁹ G. 2: 5: 8; 2: 12: 7; V. L., vol. 1, p. 107.

⁵⁰ *Mostert v. The Master*, 8 Buch,

83; 3 Roscoe, 59; *Mostert's Trustee v. Mostert*, 4 S. C. 45; *Voet*, 23: 2: 20, 89; G. 2: 11: 8; V. D. K., Th. 218.

⁵¹ *Mostert v. The Master*, 8 Buch. 83, and 3 Roscoe, 59; *Mostert's Trustee v. Mostert*, 4 S. C. 45; *Voet*, 23: 2: 19, 21; G. 1: 8: 3.

a minor by antenuptial contract without the consent of parents or guardians can derive no benefit from such minor under such contract, and according to Voet⁵² the principle is carried so far that no benefit can be derived by such spouse from the minor even by will.

The incapacity of a man to take benefits from a minor spouse under such circumstances extends also to exclude him from the administration of his wife's property.⁵³

A minor, on the other hand, is not debarred from taking benefits from the other spouse, whether the marriage be in community or by antenuptial contract.⁵⁴

CHAPTER IV.

THE CELEBRATION OF MARRIAGE.

MARRIAGE may take place either by banns or other statutory notice¹ or by special licence, and may be celebrated either by a minister of religion or a Resident Magistrate or some other marriage officer;² and the observance of these formalities is so essential to the validity of a marriage, that a marriage celebrated without due publication of banns or a special licence is void, and

⁵² Voet, 23 : 2 : 20 ; G. 3 : 2 : 10.

⁵³ *Mostert's Trustee v. Mostert*, 4 S. C. 35.

⁵⁴ Voet, 23 : 2 : 20.

¹ *Nggobela v. Sihile*, 10 S. C. 351.

² Order in Council, Sept. 7, 1838 ; Act 16, 1860 ; Act 9, 1882. The 12th section of the Marriage Order in Council authorizes the Governor to appoint Marriage Officers in those parts of the Colony where there may either be no minister of religion at all or not a sufficient number to afford convenient facilities for marriage. The appointment of all Resident

Magistrates as such Marriage Officers by Act 16, 1860, sec. 1, has rendered such special appointments somewhat unnecessary, but the power still remains, especially as regards Jewish and Mohammedan marriages (*Mashia Ibrahim v. Mahomed Essop*, (1905) T. S. 59 ; *Soetje Magmoet v. Registrar of Deeds*, (1905) T. S. 179).

Certain irregular *de facto* marriages have in times past been legalized by legislative enactment (Order in Council, secs. 30-37 ; Ord. 4, 1848 ; Act 13, 1857).

the issue of such a marriage illegitimate;³ and that divorced persons, who afterwards become reconciled and wish to live together again as man and wife, will have to comply with all the formalities of the law if their marriage is to be regarded as valid.⁴

In the case of a marriage by a minister of the Christian religion, the banns have to be published for three Sundays preceding the celebration of the marriage, during divine service in the parish in which one or both of the parties reside.⁵ If the parties live in different parishes, publication will have to be made in both parishes, and if they belong to different persuasions, then to both the congregations to which they respectively belong.⁶ No minister of religion is allowed to publish the banns of a person whom he knows to be a widow or widower, having a minor child or minor children by a former marriage, until there is delivered to him the certificate required by Act 12, 1856, sec. 6.

If after publication of banns the marriage is not celebrated within three months, the banns become void.⁷

The banns having been duly published, the marriage may be solemnized by either of the ministers who have taken part in the publication, or by some other minister, upon production to him of the certificates of due publication either in the Colony or elsewhere, where such publication is required.⁸

The celebration of the marriage will have to be according to the forms and ceremonies in use in the persuasion to which the officiating minister belongs, certain special declarations, however, being required

³ Pol. Ord., April 1, 1580, arts. 3 and 13 (see Appendix I.).

⁴ Voet, 1: 6: 11.

⁵ Order in Council, sec. 2.

⁶ *Ibid.*, secs. 3-5.

⁷ *Ibid.*, sec. 9.

⁸ *Ibid.*, sec. 6; Act 28, 1897; Act 11, 1906.

in some cases,⁹ and, except in the case of a marriage by special licence, will have to take place with open doors in the presence of two or more credible witnesses.¹⁰

Where it is intended to have the marriage celebrated by a Resident Magistrate, notice will have to be given by one of the parties to the Magistrate of the district, and, where the parties live in different districts, to the Magistrate of each district.¹¹ Such notice will then have to be affixed by the Magistrate in some conspicuous place near his Court House, and to be read on three Court days,¹² so as to enable persons wishing to raise objections to do so.¹³ Objections will have to be lodged with the Magistrate and inquired into by the Resident Magistrate's Court, with an appeal to the Supreme Court in Chambers, or to a Judge of such Court or Circuit Court.¹⁴

The marriage will have to be celebrated within three months of the expiration of the notice¹⁵ in the Court House or office of the Magistrate, or at any dwelling-house in his district, in the presence of two or more credible witnesses, with open doors, upon production to the Magistrate of a certificate of due publication of the marriage notice where such publication has taken place in more districts than one.¹⁶

⁹ Order in Council, secs. 6, 7, and 15; Order in Council, April 3, 1840; *Kicherer v. Kicherer*, 2 Searle, 81. A marriage register has to be kept by the officiating minister or Marriage Officer and a duplicate thereof sent to the office of the Colonial Secretary (Order in Council, secs. 21-23).

As to the mode of afterwards proving the marriage, see the Marriage Order in Council, secs. 18 and 21; Act 16, 1860, Schedule A, secs. 11, 12, and 28; *Schlechting v. Schlechting*, 5 Buch. 24; *Rykie v. Rykie*, 1 Buch. 114; *Matomela v. Matomela*, 2 E. D. C. 12; *Tradesmen's Benefit*

Society v. Du Preez, 5 S. C. 271.

¹⁰ Order in Council, sec. 21; *Q. v. Wells*, 1 Buch. App. C. 1.

¹¹ Act 16, 1860, Schedule A, secs. 1 and 2.

¹² *Ibid.*, sec. 4.

¹³ *Ibid.*, secs. 5-7.

¹⁴ *Ibid.*, secs. 5, 15-24.

¹⁵ *Ibid.*, sec. 13.

¹⁶ *Ibid.*, secs. 8 and 9. A Register and Marriage Record Book is to be kept by the Magistrate, the register to be sent to the office of the Colonial Secretary (Act 16, 1860, Schedule A, secs. 10 and 12). As to the subsequent proof of marriage, see Note 9, above.

In the case of marriage by a Marriage Officer, the mode of publication of the notices of such marriage is to be laid down by the Governor.¹⁷

The necessity for the publication of banns or of marriage notices may be obviated by obtaining a special licence for that purpose from a Resident Magistrate, who is authorized to grant the same,¹⁸ upon the fulfilment of certain statutory requirements.¹⁹ Such marriage will have to be celebrated within three months of the granting of the licence,²⁰ and may be celebrated at any time and at any place within the Colony by any minister of religion or Resident Magistrate.²¹

Where one of the parties is a widower or widow with a minor child by a former marriage, who is entitled to an inheritance out of the estate of the deceased parent, the marriage, as stated above,²² will not be allowed, in whichever of the above ways it may be celebrated, unless it is proved that the inheritance of such minor has been duly paid into the Guardian's Fund or secured by deed of *kinderbewys* or mortgage bond securing the inheritance of such minor.²³

A marriage is regarded as completed as soon as it has been celebrated in one or other of the above ways, although no *concubitus* or sexual intercourse may have followed, and consequently all the rights and consequences arising from and following out of marriage vest and take effect at once, whether it be a marriage in community of property or by antenuptial contract.²⁴

¹⁷ Order in Council, sec. 13.

¹⁸ *Ibid.*, sec. 11; Act 16, 1860, sec. 5; Act 9, 1882, sec. 3; *Q. v. Wells*, 1 Buch. App. C. 1.

¹⁹ Act 9, 1882, secs. 5-8; Act 16, 1860, sec. 6; Act 12, 1856.

²⁰ Act 9, 1882, sec. 4.

²¹ Order in Council, sec. 11; Act 9, 1882, sec. 3.

²² See p. 19, above.

²³ Act 12, 1856; Act 16, 1860, sec. 6; Act 9, 1882, sec. 6; Ordinance, May 23, 1805, sec. 14; Ord. 105, 1833, sec. 22.

²⁴ Voet, 23: 2: 93; 23: 4: 59; G. 1: 5: 17; V. D. K., Th. 87 and 218; Schorer, Notes 93, 94.

CHAPTER V.

THE CONSEQUENCES OF MARRIAGE.

WITH respect to the consequences of marriage, the law of the matrimonial domicile, that is, of the domicile of the husband at the time of the marriage, which by the marriage becomes, as will appear later on, the domicile of the wife also, and which is the place where the contract will have to be carried out, will have to be followed,¹ and any rights acquired by either of the spouses under such law cannot afterwards be altered or affected by any subsequent change of domicile to a country where a different law obtains, for otherwise it would always be in the power of the husband, who has the right of deciding upon the place of domicile, to vary the wife's rights of property by a change of domicile for his own benefit.²

By our law the common law consequences of marriage take effect immediately upon the completion of the marriage, nor can any alteration afterwards be made therein during the subsistence of the marriage by any act *inter vivos* between the spouses, but only by a decree of Court.³

The consequences of marriage are either such as are of the essence of the contract, and cannot therefore be altered by any agreement between the intending

¹ *Blatchford v. Blatchford*, 1 E. D. C. 365, and 1 Roscoe, 8; *Pater-son's Marriage Settlement Trustees v. Paterson's Trustees*, 2 Buch. 110; *Black v. Black's Executors*, 3 S. C. 202; *Van der Byl's Assignees v. Van der Byl*, 5 S. C. 174; *Aschen's Executor v. Blythe*, 4 S. C. 136; *Chiwel v. Carlyon*, 14 S. C. 61; *Bernstein v. Bernstein's Trustee*, *ibid.* 161; *Bosman's Trustee v. Bosman*,

ibid. 323; *Brisley v. Brisley's Executor*, 16 S. C. 313; Voet, 23 : 2 : 60, 85, 86, 88, 91, 136.

² *Blatchford v. Blatchford*, 1 E. D. C. 365; *Chiwel v. Carlyon*, 14 S. C. 61; *Bosman's Trustee v. Bosman*, *ibid.* 323; Voet, 23 : 2 : 61, 87; *Schapiro v. Schapiro*, (1904) T. S. 673.

³ G. 2 : 12 : 5; V. D. K., Th. 231; Schorer, Note 100.

spouses, or such as are merely accidental, and can therefore be varied by antenuptial contract between the parties, though not by any agreement entered into after the marriage.

Amongst the essential consequences of marriage are, naturally, as is implied in the definition of the term, the reciprocal obligations of the spouses to live together in community of life, to treat each other in such a manner as not to render such living together impossible or insupportable, to allow each other the sexual privileges of marriage,⁴ so long as these can be enjoyed without injury to the health of either spouse, and to observe perfect conjugal fidelity to each other.

By marriage, further, the parties, if minors, become of age.⁵

The personal *status* also of the wife becomes absorbed in that of the husband. She acquires his rank, in so far as that can be a matter of importance in these democratic times, and retains it even after the dissolution of the marriage by his death, only losing it upon second marriage,⁶ when she acquires the rank of her second husband, which she will retain after the death of the latter, not reverting to that of her first husband nor to her own original rank.⁷

She also acquires the domicile of the husband at the time of the marriage,⁸ and will thereafter, by virtue of his personal guardianship over her, be obliged to follow him to any other domicile he may subsequently take up, even though it may have been otherwise provided by antenuptial contract, the domicile of the

⁴ Voet, 25: 3: 1.

⁵ Voet, 23: 4: 20; 23: 2: 17, 23, 40, 49; 27: 10: 15; G. 1: 10: 2.

⁶ Voet, 23: 2: 40, 137; 1: 9: 4, 5.

⁷ Voet, 1: 9: 8; see also *Cowley*

v. *Cowley*, 18 S. A. L. J. 46.

⁸ *Mason v. Mason*, 4 E. D. C. 348; *Sklaar v. Sklaar*, 19 S. C. 336; *Jacks v. Jacks*, 20 S. C. 196.

husband being in law the domicile of the wife.⁹ In the trial of all questions, therefore, between a married woman and third parties, or between her and her husband, respecting the rights and obligations resulting from the marriage, she will always be regarded as being domiciled in the same place as her husband, though she may in reality be living elsewhere.¹⁰ Under special circumstances, however, it would appear that a married woman may for certain purposes acquire a domicile of her own.¹¹

By marriage the husband acquires the personal guardianship of the wife,¹² even though he may himself be a minor in years,¹³ for by marriage, as already stated, he becomes legally of age, and even though he may by antenuptial contract have been deprived of the marital power and excluded from the management of her affairs.¹⁴ Consequently he has the complete control of their common life, and is entitled, amongst other things, to decide where their common domicile is to be.¹⁵ On the other hand, he is bound to maintain the wife in a manner suitable to her rank and position, so much so that he will even be liable for necessities supplied to her whilst living apart from him, whenever she has been obliged to leave him on account of his misconduct;¹⁶ but he is not obliged to support her if she has

⁹ *Whipp v. Whipp*, 12 S. C. 174; *In re Miller*, 3 Searle, 227; *Reeves v. Reeves*, 1 Menzies, 244; *Pieters v. Pieters*, 16 S. C. 303; *Mason v. Mason*, 4 E. D. C. 330; *Voet*, 23 : 4 : 20; 24 : 2 : 13; 5 : 1 : 95, 101; 23 : 2 : 40. But see *V. D. K.*, Th. 228; *Schorer*, Note 100.

¹⁰ *Bestandig v. Bestandig*, 1 Menzies, 280; *Reeves v. Reeves*, *ibid.* 249; *In re Miller*, 3 Searle, 227. As to the change effected in the marital authority by a change of domicile, see *Voet*, 23 : 2 : 61.

¹¹ *Whipp v. Whipp*, 12 S. C. 174; *Atkinson v. Atkinson*, 2 Off. Rep. 212; 13 Cape L. J. 63.

¹² G. 3 : 21 : 10. As to the law by which the marital power is to be decided, see *Voet*, 23 : 2 : 60.

¹³ *Voet*, 23 : 2 : 41.

¹⁴ *McIntyre v. Goodison*, 7 Buch. 84; *Voet*, 23 : 4 : 20; G. 1 : 5 : 19; *V. D. L.* 84.

¹⁵ *Voet*, 23 : 4 : 20; 5 : 1 : 101.

¹⁶ *Coetzee v. Higgins*, 5 E. D. C. 352.

left his house without any lawful cause.¹⁷ Maintenance will, however, not be allowed to the wife when she has ample means and the husband's income is limited.¹⁸

Either spouse may also be compelled to contribute to the maintenance of the other when in want, but in case of divorce the innocent party is in no case bound to maintain the offending spouse.¹⁹

Another essential legal consequence of marriage is the rule that donations *inter vivos* between husband and wife during the subsistence of the marriage are absolutely prohibited. A donation, therefore, made by one spouse to another *stante matrimonio* is null and void, and of no effect whatsoever either as against the donor or as against his or her creditors,²⁰ whether the donation has been completed by delivery or not,²¹ and even though the spouses may, by antenuptial contract, have reserved to themselves the right to make donations to each other.²² Such a donation may consequently be revoked at any time by the donor;²³ and, where the property has actually been delivered to the donee, the donor may recover the same by *vindicatio*, provided he is prepared to refund to the donee, as *bonâ fide* possessor, the expenses incurred by the latter with regard to the property, in so far as these exceed the amount of the fruits enjoyed by him during such possession.

¹⁷ Voet, 24: 2: 18.

¹⁸ The mode of compelling maintenance is not by way of action, but by way of summary application to the Court to interpose its authority and grant maintenance in accordance with the rank and means of the parties, and to compel security to be given for the same (Voet, 25: 3: 13).

¹⁹ Voet, 25: 3: 8; 34: 1: 3.

²⁰ *Van der Byl's Assignees v. Van der Byl*, 5 S. C. 176; *Scorey v. Scorey's Executors*, 1 Menzies, 231; *Paterson's Marriage Settlement Trustees v. Paterson's Trustees*, 2

Buch. 113, 118; *Union Bank v. Spence*, 4 S. C. 339; *Hall v. Hall's Trustee*, 3 S. C. 7; *Louw's Trustee v. Louw*, 4 S. C. 420; Voet, 24: 1: 1, 17; 23: 4: 20; G. 3: 2: 9; V. D. K., Th. 486; Schorer, Note 282; V. D. L., p. 214; R. Obs., part 4, obs. 39.

²¹ *Van Niekerk's Trustee v. Van Niekerk*, 17 S. C. 470; Voet, 24: 1: 5.

²² *Hall v. Hall's Trustee*, 3 S. C. 3; V. L., C. F., part 1: 4: 12: 4-6.

²³ Voet, 24: 1: 6.

There is an exception, however, in the case where reciprocal donations have been made by the spouses to each other.²⁴ Revocation will be presumed where the parties have been divorced, or if the donee has caused the death of the donor, as also where the donor has voluntarily alienated the property to a third party.²⁵

Any alienation of such property by the donee will be null and void, until the donation is confirmed by the death of the donor,²⁶ for a donation between man and wife is confirmed by the death of the donor before the donee, unless it has previously been revoked,²⁷ provided that the estate of the donor is not then insolvent,²⁸ and provided further that the donation, if exceeding £500 sterling in value, has been duly registered in the office of the Registrar of Deeds.²⁹ A donation of this kind, however, lapses upon the death of the donee before the donor,³⁰ unless it has been confirmed by the last will of the latter, or subsequently ratified by him or her during his or her lifetime.³¹

The above rules, however, with respect to donations between husband and wife, refer only to donations *inter vivos*, and not to donations *mortis causâ*, or to testamentary bequests, nor do they apply to remuneratory donations.³² There are also many other donations between man and wife which are valid without being confirmed by the death of the donor before that of the donee, *e.g.*, where one of two spouses married by

²⁴ Voet, 39: 5: 17; Schorer, Note 282.

²⁵ Voet, 24: 1: 6.

²⁶ Voet, 24: 1: 3.

²⁷ Voet, 24: 1: 4, 17; G. 3: 2: 9; Schorer, Note 282.

²⁸ Voet, 24: 1: 6.

²⁹ *Trustees of Brink v. Mehan*

and others, 1 Roscoe, 211; *Thorpe's Executors v. Thorpe's Tutor*, 4 S. C. 488; *Van As. v. Nel and others*, 13 S. C. 427; Voet, 24: 1: 4; 39: 5: 15.

³⁰ Voet, 24: 1: 7.

³¹ Voet, 24: 1: 7, 17.

³² Voet, 24: 1: 1, 10.

antenuptial contract, excluding community of property and of profit and loss, has occupied the house or had the use of the movables of the other without paying any rent, or where the husband has made his wife an annual or monthly allowance, not out of proportion to his circumstances, and of which only a moderate amount remains unconsumed by her.³³ The same is the case with gifts of clothing and jewelry made by the husband to the wife, in order that she may keep up her proper position in society, provided they are not immoderate and out of all proportion to his means.³⁴ A donation, again, by which the donee is not made richer is allowed, *e.g.*, where the donee is merely made use of as a medium for passing property to others, or for bestowing a benefaction upon some third party or upon some pious or public cause, provided the property has been actually so passed or the money actually so bestowed.³⁵

The same rule applies to a donation whereby the donor is not rendered poorer, *e.g.*, where the husband repudiates a legacy, or *fideicommissum*, or inheritance, devolving upon him, and which, failing him, will pass to his wife.³⁶

A special exception has also been introduced by statute in favour of a cession of a life policy by a husband to his wife, whether they are married in community of property or not.³⁷

With this one exception of donations *inter vivos*, all other contracts which spouses might lawfully and effectually have entered into with each other before marriage may lawfully and effectually be entered into by them *stante matrimonio*, in so far as regards and concerns themselves, provided always that such contract

³³ Voet, 24: 1: 10.

³⁴ Voet, 24: 1: 11.

³⁵ Voet, 24: 1: 12.

³⁶ Voet, 24: 1: 13.

³⁷ Act 13, 1891, sec. 18.

be not of such a nature as to constitute, either directly or indirectly, a donation between husband and wife.³⁸ No contract, for instance, whereby the one spouse grants or conveys a stipulation in favour of the other, and that other receives only that and nothing more, which the former was under a legal obligation to grant or convey to or stipulate in favour of the latter, and which by law the latter could compel the former to grant, convey, or stipulate, is or can be deemed in law to constitute a deed of donation between the spouses; and such contract is therefore effectual in all questions as between themselves.³⁹

Contracts between husband and wife are, of course, only possible, that is, so as to have any legal effect, where the community of property has been excluded by antenuptial contract as well as the marital power, and the administration of her own property reserved to the wife. Only in such a case can a husband and wife stand to each other in the position of absolutely separate persons in law, so as to be able to carry out contracts entered into between them. Where there is community of property between the spouses, the effect of a contract between the spouses would be that the rights acquired by either spouse under the contract would fall back into the community, or, in other words, the effect would be the same as if no contract had been entered into.⁴⁰

The non-essential consequences of marriage, which may be altered or excluded by antenuptial contract, are community of property and of profit and loss, and the marital power.⁴¹

³⁸ *Ziedeman v. Ziedeman*, 1 Menzies, 239; Voet, 23: 2: 63; 24: 1: 8; Schorer, Notes 17 and 23.

³⁹ *Ziedeman v. Ziedeman*, 1 Menzies, 239.

⁴⁰ *Albertus v. Albertus's Executors*, 8 Searle, 210 *et seq.*; Schorer, Note 17.

⁴¹ G. 3: 21: 10.

By the law of this Colony, marriage lawfully contracted and not preceded by an ante-nuptial contract between the intending spouses creates a universal partnership or community of property between the husband and wife,⁴² and every marriage is presumed to be in community of property until the contrary be proved.⁴³ It is competent, however, for the parties before marriage to regulate their respective rights by express contract; but, in the absence of such contract, they are understood to enter into a tacit agreement that the common law community of property shall prevail.⁴⁴

The effect of such community is, that immediately upon the completion of the marriage all property vested in either spouse or becoming so vested during the subsistence of the marriage, *ipso jure* and without the necessity of any delivery or transfer becomes the common property of both,⁴⁵ and that without reference, in regard to after-acquired property, whether the acquisition was made in the name of both spouses or of only one,⁴⁶ or to the source from which such property was derived, whether by way of inheritance, legacy, donation, or in any other way,⁴⁷ or to the amount brought into the joint estate by each spouse.⁴⁸ In fact, even where there has been a misrepresentation by one or other of the parties before marriage as to his or her financial position, this will not entitle the other party after marriage to any right of compensation, such right being extinguished

⁴² *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 126; G. 2 : 11 : 8; 3 : 21 : 10.

⁴³ *Faure v. Divisional Council of Tulbagh*, 8 S.C. 72; *Estate of Tantsi v. Executor of Estate Nchela*, 21 S.C. 648.

⁴⁴ *Chiwell v. Carlyon*, 14 S.C. 65; *Blatchford v. Blatchford*, 1 E. D. C. 367.

⁴⁵ *Chiwell v. Carlyon*, 14 S. C. 65; *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 126; Voet, 23 : 2 : 65, 68; V. D. K., Th. 216; V. D. L. 87.

⁴⁶ Voet, 23 : 4 : 30.

⁴⁷ *Tesselaar's Trustee v. Blanckenberg's Executors*, 7 Buch. 54.

⁴⁸ Voet, 23 : 2 : 68.

by the community.⁴⁹ In other words, a universal community of property, as well as of acquests or of profit and loss, is established between the spouses, with the exception only of policies of insurance, which, subject to certain conditions or limitations, are excluded from the community by Act 13 of 1891.⁵⁰

The community will include property of every kind whatsoever, movable as well as immovable, whether it be situate in the Colony or elsewhere where community of property is not recognized,⁵¹ unless in the latter case the nature of the property is opposed to such community in the country by whose laws the rights to the same will have to be regulated,⁵² or except in the case of immovable property situate in another country, the laws of which require a more formal mode of transfer; but even in this latter case a personal action will lie to compel transfer in due form according to the law of such country.⁵³

Fideicommissary property, of course, inasmuch as it is not vested in the fiduciary, but only gives him a right to the enjoyment of the property whilst the *fideicommissum* is in existence, does not come under the community, except as regards the fruits thereof.⁵⁴

Property may also be validly bequeathed or given to or settled upon one of the spouses in such a manner as to exclude it from the community, but such bequest, gift, or settlement will require to be very carefully worded.⁵⁵ In *Tesselaar's* case,⁵⁶ for instance, the Court decided that a legacy which directed that certain property "should be enjoyed by his (the testator's)

⁴⁹ G. 2 : 11 : 11.

⁵⁰ Act 13, 1891, sec. 17 *et seqq.*

⁵¹ Voet, 23 : 4 : 29.

⁵² *Poppe v. Hom, Eagar & Co.*,
1 Menzies, 221.

⁵³ *Chivell v. Carlyon*, 14 S. C. 66;

Voet, 23 : 2 : 85.

⁵⁴ G. 2 : 11 : 10; Schorer, Note 94;
V. D. K., Th. 221.

⁵⁵ Voet, 23 : 4 : 45.

⁵⁶ *Tesselaar's Trustees v. Blanckenberg's Executors*, 7 Buch. 54.

daughter as free and own property without any deduction" was not a settlement upon the daughter to her separate use, so as to prevent the trustee of the insolvent estate of the daughter's husband from claiming such property for the benefit of the creditors of the latter. But in *Bosman v. Richter*,⁵⁷ a bequest "burthened with entail of *fideicommissum* in such manner that the usufruct or interest of the said inheritance shall not be paid by the executor to any other person than to the niece," married in community of property to a man whose estate had since been sequestrated, was held to be a sufficient settlement to the separate use of the niece to prevent the trustee of her husband's insolvent estate from laying claim to such usufruct or interest.

The community involves at the same time a community of liability for debts, and consequently all the debts of either spouse, whether contracted before or during the subsistence of the marriage, will, during such subsistence, be the joint liability of the spouses;⁵⁸ nor can this joint liability be avoided even by an express stipulation to that effect in an antenuptial contract, unless the community of property is excluded at the same time.⁵⁹ With respect to debts contracted during the marriage, the common liability is absolute and permanent;⁶⁰ but with respect to those contracted before marriage, it is merely temporary, and only lasts as long as the marriage subsists.⁶¹ In other words, as long as the marriage lasts the common estate is liable

⁵⁷ *Bosman v. Richter*, 2 Searle, 78.

⁵⁸ *Liquidators of the Union Bank v. Kiver, Widow and Executrix of Hofmeyer*, 8 S. C. 146.

⁵⁹ Voet, 23: 2: 80; G. 1: 5: 22; 2: 11: 12; V. D. K., Th. 93 and 222; Schorer, Notes 20 and 95;

V. D. L. 87.

⁶⁰ *Sichel v. De Wet*, 5 E. D. C. 58; *Faure v. Divisional Council of Tulbagh*, 8 S. C. 72.

⁶¹ *Reis v. Executors of Gilloway*, 1 Menzies, 198; Voet, 23: 2: 80; G. 2: 11: 15.

for the debts, whether of the husband or wife, contracted before the marriage, and also for all debts contracted by the husband by virtue of his marital power during the marriage ;⁶² but as soon as the marriage is dissolved by the death of either of the spouses, the half of the joint estate coming to the survivor continues liable for his or her debts contracted before marriage, but it ceases to be liable for the like debts of the deceased, and so also *vice versâ*.⁶³

Amongst the debts contracted previous to the marriage, which come under the community, may here be specially mentioned the duty to maintain the children of a former marriage, which will be a common liability during the subsistence of the second marriage, but will cease upon its dissolution ;⁶⁴ and, amongst the debts contracted during the marriage, the duty to maintain adulterine children procreated by the husband during the marriage, as long as the wife is satisfied to continue the marriage notwithstanding her husband's adultery,⁶⁵ as also the ordinary pecuniary penalties imposed for crime, but not confiscation of property,⁶⁶ if such should still be allowable in any case in this Colony.⁶⁷

The community will include not only all property owned by the spouses at the time of the marriage, but also all profits, gains, or acquests, the right to which has become vested in, as well as all losses the liability to which has become attached to, either spouse during the subsistence of the marriage, even though the actual profit may be received or reduced into possession

⁶² *Sichel v. De Wet*, 5 E. D. C. 58 ;
Faure v. Divisional Council of Tul-
bagh, 8 S. C. 72.

⁶³ *Blatchford v. Blatchford*, 1
E. D. C. 368.

⁶⁴ Voet, 23: 2: 81, 82 ; Schorer,
Note 94.

⁶⁵ Voet, 23: 2: 82.

⁶⁶ Voet, 23: 2: 56.

⁶⁷ As to confiscation of property
in this Colony, see the Placaat of the
States General of Aug. 10, 1778,
promulgated in the Colony on April
23, 1779.

or the actual loss sustained only at a later date.⁶⁸ This branch of the community is known in our law as the community of profit and loss, as distinguished from simple community of property, and forms, as will be seen later on when we treat of antenuptial contracts, a very important branch of the subject.

Where any right to a profit or liability to a loss has vested before the dissolution of the marriage, and thus become part of the joint estate, but the actual profit or loss is to accrue only at a later date, it is always advisable upon the dissolution of the marriage and the division of the estate to provide for security to meet such eventuality.⁶⁹

Liabilities to third parties arising out of fraud or negligence on the part of the husband also falls under the community of profit and loss, and will have to be borne by the spouses in common, and, if community of property has been excluded, but community of profit and loss retained, such liabilities will, at the dissolution of the marriage, first have to be made good out of the acquests or profits, and, if there are none such, will have to be met out of the rest of the property of the spouses in equal shares.⁷⁰

Community of property, once established between the spouses, only ceases upon the dissolution thereof by a decree of Court, or upon the dissolution of the marriage by the death of one or other of the spouses. It takes effect also, not only in the case of a first, but also in that of a second or subsequent marriage.⁷¹

By marriage the woman becomes a minor and her husband her guardian, not only as regards her person,

⁶⁸ *Liquidators of Union Bank v. Kiver*, 8 S. C. 146.

⁶⁹ Voet, 23: 2: 84.

⁷⁰ Voet, 24: 2: 21.

⁷¹ G. 2: 1: 9; V. D. K., Th. 219, 232, 273-276.

as shown above,⁷² but also as regards her property. This guardianship of the husband over the wife's property is spoken of as his *marital power* or *marital authority*, and confers on the husband the exclusive right of managing and administering not only all the property belonging to the joint estate,⁷³ but also the separate property of the wife herself, even though the community of property and of profit and loss may have been excluded by antenuptial contract, unless the marital authority has itself also been excluded and the management of her own affairs reserved to the wife.⁷⁴ A husband cannot, however, enter into any agreement whereby the personal freedom of action of the wife after the dissolution of the marriage is in any way interfered with. Consequently where a husband married in community of property entered into an agreement not to carry on business for a certain period in a certain place, it was held that, though this would bind the wife during the marriage, inasmuch as the husband would benefit by any breach of the agreement by her, and she, besides, would be regarded as the husband's agent in anything she does, seeing that she could not enter into any business without his consent, this would cease to be the case after the dissolution of the marriage, when she would no longer be bound by the agreement.⁷⁵

By virtue of this marital power the husband is entitled to alienate, pledge, or mortgage the wife's property, whether movable or immovable, without her consent;⁷⁶ nor does it affect the validity of such

⁷² See p. 30, *ante*.

⁷³ *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 126.

⁷⁴ Voet, 23: 2: 53; V. L., vol. 1, p. 42.

⁷⁵ *Merrington and Adams v. Welt*, 15 S. C. 313.

⁷⁶ Voet, 23: 2: 52, 58, 59, 63; 23: 5: 7; G. 1: 5: 22; V. D. K., Th. 91, 92; Schorer, Note 17.

alienation, pledge, or mortgage whether the community of property and of profit and loss has been excluded or not.⁷⁷ Nay even where such community has been excluded with the special provision added that *the wife's property is to be secure to her*, but without at the same time excluding the marital power, this will not deprive the husband of the right of alienating his wife's property. Consequently, if he does so alienate it, the wife will not be entitled to recover the property by *vindicatio* from the party to whom it has been alienated, but will have an action against the husband's estate for the value of the property and will be entitled to a preference for the same over the rest of the husband's creditors.⁷⁸ If in addition to this the antenuptial contract contains an express prohibition of the alienation of the wife's property by the husband, the wife will further be entitled to follow up her alienated property and recover the same from any third possessor by *vindicatio*.⁷⁹

A husband may even make donations to the prejudice of his wife, provided this is not done in deliberate fraud of the wife or her heirs.⁸⁰

Where the husband has caused loss or damage to the wife by fraud or negligence, her right to redress will depend upon whether the marital authority has been excluded by antenuptial contract and upon the extent to which community has been excluded. Where

⁷⁷ Voet, 23: 2: 59; 23: 5: 7.

⁷⁸ Act 21, 1875, sec. 10; Voet, 23: 2: 63; 23: 5: 7; Schorer, Note 23; R. Obs., part 1, obs. 12. Where, however, community of property and the marital power have been completely excluded, the wife will have no tacit hypothec over the husband's estate for any claim she may have against him (*Ruperti's Trustees v.*

Ruperti, 4 S. C. 22; *Mostert's Trustee v. Mostert*, 4 S. C. 35).

⁷⁹ Voet, 23: 5: 7; 23: 4: 21, 50; R. Obs., part 1, obs. 12.

⁸⁰ *Davis v. Trustees of Minors, Brisley and another*, 18 S. C. 407; Voet, 23: 2: 54; 23: 3: 15. See also the authorities collected in the case of *Linde v. Beyers*, 1 S. C. 411. But see Voet, 24: 2: 21.

there has been no such exclusion, there can be no question of any liability for fraud or negligence on the part of the husband.⁸¹

The wife may, however, even during the subsistence of the marriage, take steps for protecting herself against the prodigality of the husband by applying to the Court either for a separation of goods (*separatio bonorum*) or for an interdict restraining the husband from parting with her property.⁸² Such interdict is most frequently applied for and granted where a wife is instituting an action for divorce or judicial separation against her husband, and has reasonable grounds for fearing that the husband may do away with her property or that of the joint estate in anticipation of such divorce or separation being granted.⁸³

Where a wife has obtained a decree of separation of goods or an interdict restraining her husband from alienating her property, any alienation of the wife's property by the husband will be null and void, and the wife will be entitled to claim by *vindicatio* any property so alienated.⁸⁴ Prescription will not in such a case run against the wife's right of action during the marriage, she being a minor and under her husband's guardianship, and prescription not running against minors; but if, after the dissolution of the marriage, she allows the period of prescription to elapse without taking action, she will be barred.⁸⁵

Whilst the powers of the husband are, on the one

⁸¹ Voet, 24: 3: 21; 23: 2: 53, 63; V. D. K., Th. 91.

⁸² *Steele v. Steele*, 1 Roscoe, 51; Voet, 23: 2: 52; G. 1: 5: 24; Schorer, Note 96; V. D. L. 85.

⁸³ *Liebertrau v. Liebertrau*, 12 S. C. 274; *Hayward v. Hayward*,

6 E. D. C. 192; *Umgulwa v. Umgulwa*, 7 E. D. C. 73; *Ex parte Malagasi*, 9 E. D. C. 149; *Rabie v. Rabie*, 1 Menzies, 241; R. Obs., part 4, obs. 8.

⁸⁴ Voet, 23: 5: 7.

⁸⁵ Voet, 23: 5: 8.

hand, so extensive, those of the wife, on the other, are proportionately limited.

Like other minors, she has no judicial status or *locus standi in judicio*, and cannot appear in Court without the sanction and assistance of her husband, even where community of property and of profit and loss have been excluded,⁸⁶ but can only sue and be sued through him.⁸⁷ The summons in such a case will, in an action based upon contract, when there is complete community, be against the husband personally, and, where community has been excluded, against the wife "duly assisted by the husband."⁸⁸ In an action based on a tort or injury committed by the wife, it would appear that the wife should be sued, assisted by her husband, or, if the husband is sued, he should be sued in his capacity as the husband and guardian of his wife.⁸⁹

A married woman has no right to dispose either of her own property or of property belonging to the joint estate, nor to enter into any contract, without the express or implied consent or ratification of her husband,⁹⁰ and if she does contract without such consent, the contract is void, and will not bind either her husband or herself,⁹¹ either during the subsistence of the marriage or after its dissolution.⁹² So much is

⁸⁶ *Prince, q.q., v. Anderson*, 1 Menzies, 176; *Landsberg v. Marchand*, *ibid.* 200; Voet, 5: 1: 14 *et seq.*; G. 1: 5: 22, 23; Schorer, Note 21.

⁸⁷ *McIntyre v. Goodison*, 7 Buch. 84; *Selby v. Friemond*, 5 S. C. 266; *Michler v. Saunders*, 11 S. C. 26; *Clark v. Johnson*, *ibid.* 414; *Van Eeden v. Kirstein*, Kotze, 182; *Mashia Ibrahim v. Mohamed Essop*, (1905) T. S. 59; Voet, 5: 1: 14; 23: 2: 41; R. Obs., part 4, obs. 7; V. L., vol. 1, p. 42; V. D. L. 84.

⁸⁸ *Landsberg v. Marchand*, 1 Menzies, 200. See also *Davidson v. Silvertown*, 22 S. C. 502.

⁸⁹ *Klette v. Pfitze*, 6 E. D. C. 134; *Snooks v. Bosman*, 2 E. D. C. 201.

⁹⁰ Voet, 23: 2: 42, 47; G. 1: 5: 23; V. L., vol. 1, p. 194.

⁹¹ *McIntyre v. Goodison*, 7 Buch. 84; *Soetje Magmoet v. Registrar of Deeds*, 5 S. C. 179; *Executors of Morkel v. Heirs of Morkel*, 1 Menzies, 177; V. L., vol. 1, p. 42.

⁹² Voet, 23: 2: 42; 12: 6: 19.

this the case, that where the wife has *stante matrimonio* contracted a debt and made a payment in satisfaction of the same without her husband's consent, both the husband during the marriage and she after his death may by the *condictio indebiti* recover what she has so paid.⁹³ She may even do so where she has made the payment after the dissolution of the marriage, provided she did so in ignorance of her legal rights ; but, if she did so with a full knowledge of her rights, she is regarded as having ratified the contract made during the marriage.⁹⁴

The incapacity of the wife to contract carries with it, of course, the incapacity to release a debtor from an obligation validly contracted. Consequently a payment cannot validly be made to the wife without her husband's consent, and, if made, will not release the debtor,⁹⁵ unless it can be proved that the husband has actually received or had the benefit of such payment.⁹⁶

But though a wife cannot bind herself or her husband by contract to a third party, she may, like any other minor, validly bind such third party to herself and her husband,⁹⁷ and may, if so advised, sue upon such contract after her husband's death.⁹⁸

A contract also made by her without her husband's consent will be binding upon both herself and her husband, in so far as they have been enriched or benefited thereby.⁹⁹

A wife may also validly contract and incur debts in matters connected with housekeeping,¹⁰⁰ unless she

⁹³ Voet, 12 : 6 : 19.

⁹⁴ *Ibid.*

⁹⁵ *Brath v. Mulder*, 1 Menzies, 207.

⁹⁶ Voet, 23 : 2 : 50.

⁹⁷ Voet, 23 : 2 : 44.

⁹⁸ Voet, 23 : 2 : 43.

⁹⁹ *Ibid.*

¹⁰⁰ *Grassman v. Hoffman*, 3 S. C. 282; *Mason v. Bernstein*, 14 S. C.

has been expressly interdicted from so doing by the Court.¹⁰¹

She may also validly act in matters in which she is acting in a fiduciary capacity merely, and not in her own name. She may therefore validly pass transfer, without her husband's assistance, of immovable property belonging to an estate of which she is executrix. In such a case the Registrar of Deeds will be justified in passing transfer, if he is satisfied that the husband has had notice of the application and has no reasonable grounds of objection ; but where the husband has given notice of his intention to apply to the Court to prevent the transfer being passed, the Registrar may refuse to pass transfer until the Court has given its consent.¹⁰²

To the above general rules as to the incapacity of the wife to appear in Court or to contract without the husband's consent, there are two further exceptions of a general character—

(1) Where the woman has by antenuptial contract reserved to herself the management and control of her separate property, which has by such contract been excluded from the community.¹⁰³

(2) Where the woman is a public trader, or carries on a mercantile business with the express or implied consent of her husband, in which case she may sue and be sued and enter into contracts with respect to all matters appertaining to such trade or business without her husband's assistance or consent.¹⁰⁴ But if the husband, having once given his consent to his

504; *Du Preez v. Cohen Brothers*, (1904) T. S. 157.

¹⁰¹ Voet, 23 : 2 : 46 ; G. 1 : 5 : 23 ; Schorer, Note 21 ; V. L., vol. 1, pp. 44, 194.

¹⁰² *Van der Brock v. Registrar of Deeds*, 3 S. C. 296 ; *Sissing's Executrix*

v. Registrar of Deeds, 2 Cape L. J. 99.

¹⁰³ *Boyce v. Verzigman*, 9 Buch. 229 ; *Van Eeden v. Kirstein*, Kotze, 184 ; V. D. L. 396. But see Voet, 5 : 1 : 14 ; 23 : 4 : 20.

¹⁰⁴ *McIntyre v. Goodison*, 7 Buch. 84 ; *Grassman v. Hoffman*, 3 S. C.

wife's trading, afterwards withdraws his consent, the wife falls back into her original state of legal incapacity, provided that due notice of the withdrawal is given to all whom it may concern, and that no prejudice is thereby caused to third parties.¹⁰⁵

The husband's consent, as already stated, may be either express or implied, and may be given either in advance or by way of ratification, and may be either general or special.¹⁰⁶

If, however, the husband wilfully withholds his consent or assistance, when required, in any matter which may be for the benefit of the wife, such as the bringing or defending of an action,¹⁰⁷ or the conclusion of a contract, the Court will, upon sufficient cause being shown, interpose its authority and give the wife leave to sue or defend or to contract without her husband's assistance.¹⁰⁸

Under special circumstances also, where it is impossible to obtain the husband's consent, the Court will sometimes interpose its authority, and give the wife leave to contract¹⁰⁹ or deal with the common property without the husband's consent.¹¹⁰ Thus the Court has, upon sufficient cause shown, authorized a married woman, who has been deserted by her husband for years, to sell immovable property belonging to herself,¹¹¹ or even property belonging to the joint estate,

282; *Selby v. Friemond*, 5 S. C. 261; *Rigg & Sons v. Will*, 7 E. D. C. 183; *Van Eeden v. Kirstein*, Kotze, 184; *Van Ronn, Schabbel & Co. v. Ferraro*, 2 S. Af. Rep. 231; Voet, 23: 2: 44; G. 1: 5: 23; Schorer, Note 22; R. Obs. part 2, obs. 5 and part 4, obs. 7; V. D. L. 396; V. L., vol. 1, p. 43. See also *Brown v. Dyer and Dyer*, 3 E. D. C. 267.

¹⁰⁵ Voet, 23: 2: 44.

¹⁰⁶ Voet, 23: 2: 42, 47.

¹⁰⁷ *Gray v. Spengler*, 1 Menzies, 201; Voet, 5: 1: 18.

¹⁰⁸ *Venter v. Venter and the Registrar of Deeds*, 9 S. C. 381; Voet, 23: 2: 42.

¹⁰⁹ *In re Henry*, 5 Searle, 308.

¹¹⁰ *Ferreira and others v. Registrar of Deeds*, 3 S. C. 387.

¹¹¹ *Ex parte Westerdijk*, 1 Off. Rep. 286.

but under certain conditions,¹¹² or has authorized the payment to her of moneys belonging to the joint estate, or coming to herself or her husband by way of inheritance.¹¹³

If the husband becomes of unsound mind, or otherwise unfit to give his consent, that mere fact will not entitle the wife to contract without such consent. The proper course for her in such a case is to have him declared of unsound mind, and placed under curatorship, in which case she may be appointed *curatrix bonis* for the administration of his property and affairs.¹¹⁴

Whilst, however, the husband's marital authority over the wife and her property resembles ordinary guardianship in some respects, it differs from it very widely in others. For instance—

(1) A guardian is not allowed to alienate immovable property belonging to his ward without the leave of the Court, but a husband may sell his wife's immovable property without such leave,¹¹⁵ unless the marital power has been expressly excluded.

(2) A guardian cannot contract with his ward, unless there are several guardians, in which case one guardian may contract with the ward through a co-guardian; but a husband may validly contract with his wife, to whom he is married by antenuptial contract, excluding community of property and reserving to the wife the management of her own affairs,¹¹⁶ provided such contract does not amount to an

¹¹² *Re Hendrika Julius*, 2 S. C. 103.

¹¹³ *In re Miller*, 4 Buch. 28; *In re Nelson*, 6 Buch. 130; *In re Meyer*, 1 Roscoe, 285; *Ex parte Fourie*, 8 S. C. 115; *Re Clinton*, 6 E. D. C. 104; *In re Booyesen*, Foord, 187.

¹¹⁴ *In re De Jager*, 6 Buch. 228;

Voet, 23: 2: 48; 27: 10: 10; G. 1: 18: 7; Schorer, Note 47; V. D. K., Th. 168.

¹¹⁵ Voet, 23: 2: 63.

¹¹⁶ *Albertus v. Albertus' Executors*, 3 Searle, 211.

evasion of the law and an infringement of the rule which prohibits donations between husband and wife.¹¹⁷

(3) Minors have a legal hypothec over the goods of their guardians in security of their property, but a wife has no such hypothec, unless it has been expressly provided by antenuptial contract, excluding community of property and of profit and loss, but not excluding the marital power, that the wife's property shall not be liable to alienation by the husband, but shall be secured to her.¹¹⁸

(4) Guardians are bound at the end of their guardianship to render accounts and indemnify their wards, but a husband is not obliged to account either to the wife herself or to her heirs, nor to indemnify the wife for any damage done to her property through his neglect, except where it has been otherwise provided by an antenuptial contract,¹¹⁹ as in the exceptional case mentioned in the preceding paragraph.

CHAPTER VI.

ANTENUPTIAL CONTRACTS.

THE common law with respect to community of property and of profit and loss and the marital power, as laid down above, may be largely modified and even entirely set aside by antenuptial contract, that is, by

¹¹⁷ *Albertus v. Albertus' Executors*, 3 Searle, 210; *Ziedeman v. Ziedeman*, 1 Menzies, 239; *Hull v. Hall's Trustee and Mitchell*, 3 S. C. 8; Voet, 23: 2: 63; 24: 1: 8; Groen., De

Leg., C. 4: 29: 11.

¹¹⁸ *Ruperti's Trustees v. Ruperti*, 4 S. C. 22; *Mostert's Trustees v. Mostert*, *ibid.* 35; Voet, 23: 2: 63.

¹¹⁹ Voet, 23: 2: 52, 53, 63.

a contract entered into between the intending spouses before marriage, whereby the relations of the spouses as regards their rights of property are regulated.¹ To such a contract not only the intending spouses themselves, but third parties, such as the trustees to a marriage settlement, or relations or other persons who wish to make such settlement or to confer some other benefit upon the spouses, may be parties.²

In the execution of an antenuptial contract the solemnities required by the law or custom of the place where it is *bonâ fide* entered into will have to be followed. The language of such contracts will have to be interpreted according to the law of the place where it was executed;³ but as regards its effects and legal consequences, the law of the matrimonial domicile will have to be followed not only as regards movables, but even as regards immovable property situate in another country, the law of which as regards formalities has not been complied with in the execution of the antenuptial contract.⁴

By the law of this Colony an antenuptial contract has to be in writing, and requires, as a general rule, to be executed and registered before marriage, though under special circumstances the Court will grant leave to have such contract executed, or at any rate registered, after marriage; but in that case the contract will not be effectual as against creditors whose claims have arisen between the date of the marriage and the registration.⁵

¹ Voet, 23 : 4 : 1; G. 2 : 12; 3; V. D. K., Th. 223.

² V. D. K., Th. 228.

³ *Paterson's Marriage Settlement Trustees v. Paterson's Trustees in Insolvency*, 2 Buch. 118.

⁴ *Bernstein v. Bernstein's Trustee*,

14 S. C. 161; *Bosman's Trustees v. Bosman*, *ibid.* 323.

⁵ *Twentyman and another v. Hewitt*, 1 Menzies, 158; *In re Moolman*, 1 S. C. 25; *Ex parte Purchase and wife*, 3 S. C. 84; *Schoombie v. Schoombie's Trustees*, 5 S. C. 189;

As regards formalities, an antenuptial contract requires to be executed before a notary and two witnesses (underhand documents not being entitled to registration⁶), and registered in the office of the Registrar of Deeds,⁷ and a duplicate or notarial copy of the contract left in the office of the Registrar of Deeds for general information.⁸

The registration is essential only for the protection of creditors, and not also for that of the spouses or the children of the marriage, as between whom an antenuptial contract will be valid even if not registered.⁹ Absence of registration only renders a contract void in competition with creditors of either of the spouses, and previous to the enactment of Act 21, 1875, that is, under the Proclamation of May 23, 1805, provided the contract was notarial, want of registration only deprived the wife of the legal hypothecs to which she would otherwise have been entitled, and postponed her claim to all registered conventional special hypothecs even of later date,¹⁰ but did not deprive her of a preference over concurrent creditors, nor of property clearly her own before the marriage.¹¹

In re Steele, 10 S. C. 206; *Ex parte Taylor and wife*, 12 S. C. 348; *In re Houghton*, 15 S. C. 8; *Ex parte Irving*, 11 E. D. C. 61; *Re Potgieter*, 4 Cape L. J. 286; *Ex parte Peters and wife*, 16 S. C. 442; *Ex parte Wells and Wells*, (1905) T. S. 54; *Ex parte Ingall and wife*, 20 S. C. 323; *Ex parte Dyer and wife*, 20 S. C. 430; *Ex parte Barnett and wife*, 18 S. C. 406; Voet, 23: 4: 3. See also *Pollard and Pollard v. Registrar of Deeds*, (1903) T. S. 353.

⁶ Act 21, 1875, sec. 9.

⁷ Proclamation of May 23, 1805, secs. 11, 12; Act 21, 1875, secs. 2, 7; *Wright v. Barry*, 1 Searle, 6, and 1 Menzies, 175; *Aschen's Executrix v.*

Blythe, 4 S. C. 136; *Tansend v. Crow*, 2 S. Af. Rep. 74.

⁸ Act 21, 1875, sec. 2. As to contracts executed in British Kaffraria, see Act 21, 1875, sec. 8, and *Hutcheon v. Registrar of Deeds of Kaffraria*, 3 E. D. C. 229.

⁹ *Trustees of Paterson's Marriage Settlement v. Paterson's Trustees in Insolvency*, 2 Buch. 95; *Aschen's Executrix v. Blythe*, 4 S. C. 136; *Steytler v. Dekkers*, 2 Roscoe, 98.

¹⁰ *Aschen's Executrix v. Blythe*, 4 S. C. 136.

¹¹ *Steytler v. Dekkers*, 2 Roscoe, 98; *Glynn v. Van der Byl & Co.*, 4 Searle, 117; *V. D. K.*, Th. 229; *V. D. L.* 74.

Persons not domiciled in the Colony, and having no immovable property in the Colony, are not entitled to registration of their antenuptial contracts in the Deeds Registry of the Colony.¹²

Antenuptial contracts executed elsewhere than in the Colony may be registered here, whether executed before a notary or not, and will, if registered, and if a duplicate original or copy thereof, attested by a notary entitled to practise in the Colony, be deposited in the Deeds Registry, have the same effect in regard to creditors as if it had been executed before a notary in the Colony.¹³ But where an antenuptial contract has been validly executed elsewhere, it is not compulsory to have the same registered in the Colony, in order to affect property situate here.¹⁴

It is hardly necessary to add in conclusion that an antenuptial contract, though executed before marriage, only takes effect when marriage actually follows, and then immediately upon its completion.¹⁵

Where such contract has been duly registered and no marriage subsequently takes place, application may, after the lapse of a reasonable time, be made to have the registration cancelled in the Deeds Registry Office.¹⁶

As regards their subject-matter, antenuptial contracts may, at the discretion of the parties, contain any provisions whatsoever, so long as these are not opposed to nature, reason, and morality, or prohibited by law,¹⁷ and do not conflict with the essential consequences of the contract of marriage as laid down

¹² *In re Orpen et Uxon*, 2 Searle, 274.

¹³ Act 21, 1875, sec. 9; *Ex parte Irving*, 11 E. D. C. 61.

¹⁴ *Bernstein v. Bernstein's Trustee*, 14 S. C. 161; *Bosman's Trustees v.*

Bosman, *ibid.* 323.

¹⁵ Voet, 23: 4: 59.

¹⁶ *In re Holm*, 16 S. C. 351.

¹⁷ Voet, 23: 4: 15, 19, 20; V. D.K., Th. 228.

above.¹⁸ Agreements, consequently, that the husband shall be under the guardianship or control of the wife, or that the husband, who is a minor in years, shall have no authority nor carry on any business till he comes of age, or that the husband shall never change his domicile,¹⁹ or that the husband and wife shall be entitled to make donations to each other during the subsistence of the marriage,²⁰ are null and void, as being opposed to the essence of the contract of marriage.²¹

In drafting antenuptial contracts the greatest care should be exercised, seeing that such contracts are interpreted strictly and in the sense which makes the least departure from the common law. Hence, according to Voet,²² if an antenuptial contract provides that the survivor is to retain all the *movables*, this will not include *actions*, which in their nature are not movables, but *incorporeals*. The main object, however, in such interpretation must always be to ascertain the real intention of the parties. Consequently, where an antenuptial contract excluded community of property generally, and especially as regards certain property enumerated in a schedule which it declared to be the property of the wife, whereas such property in fact belonged to the husband, but was intended to be settled upon the wife by the contract, it was held that such provision amounted to a valid settlement of the property upon the wife, it having been subsequently, as it appeared, duly delivered to her in terms of the contract.²³ And where a parent has made a settlement upon a daughter upon the condition that *if the latter*

¹⁸ See p. 29, above. See also Voet, *Mitchell*, 3 S. C. 3; Voet, 23 : 4 : 16, 23 : 4 : 16; Schorer, Note 100; 20.
V. D. L. 75.

¹⁹ Voet, 23 : 4 : 20; 5 : 1 : 101; Schorer, Note 100.

²¹ Voet, 23 : 4 : 20.

²² Voet, 20 : 4 : 74.

²³ *Louw's Trustees v. Louw*, 4 S. C. 420.

²⁰ *Hall v. Hall's Trustee and*

dies during the marriage the property is to be restored to the parent, such condition will, according to Voet,²⁴ receive a benevolent interpretation on the ground of the presumed promptings of natural affection, and be construed in case of doubt to read as if it were worded : “ if the latter dies during the marriage *without leaving any issue surviving.*”

The non-essential consequences of marriage may be altered or modified to any extent, or may be entirely excluded, and this may be done either in general terms, as by the choice of a law of succession other than that obtaining in the Colony, or specifically, by altering the law in certain particulars.²⁵ The specific alterations of the common law consequences of marriage may be considered under four heads, namely—

(1) The exclusion of the marital power.

(2) The prohibition of alienation of the wife's property.

(3) The exclusion of community of property as well as of profit and loss.

(4) The exclusion of community of property alone.

With respect to all of these it may be premised generally that no particular form of words is required, so long only as the meaning intended is clearly conveyed.²⁶ A contract therefore which excluded community of property, and further provided that the spouses are “respectively to retain and possess all their respective estate and effects, movable and immovable, etc., as fully and effectually as they respectively might or could, if the intended marriage did not take place,” has been held to exclude the marital power.²⁷ An agreement, again, that one of the spouses

²⁴ Voet, 23 : 4 : 73.

²⁵ Voet, 23 : 4 : 19, 27.

²⁶ *Steytler v. Dekkers*, 2 Roscoe,

98; *Boyes v. Verzigman*, 9 Buch.

229; Voet, 23 : 4 : 28, 71.

²⁷ *Steytler v. Dekkers*, 2 Roscoe, 98.

shall not be liable for the debts of the other, but only for his or her own debts, and that all inheritances, legacies, and gifts shall be the separate property of the spouse upon whom the same may devolve, or to whom the same may be bequeathed or given, has been held to amount to an exclusion of community of profit and loss.²⁸

It may further be laid down that antenuptial contracts must be strictly interpreted, and consequently all the common law consequences of marriage which are not clearly excluded must be regarded as continuing in force.²⁹ Thus, where community of property alone is excluded, community of profit and loss, as well as the marital power, remains,³⁰ and when community both of property and of profit and loss is excluded, the marital power remains.³¹

The exclusion of the marital power is generally accompanied with the exclusion of all community, as well of property as of profit and loss. Where this has been done, the wife is, as regards the management and control of her own property, in the same position as if no marriage had ever taken place. She has full authority to appear in Court, whether as plaintiff or defendant, and to enter into contracts without her husband's assistance.³² On the other hand, the husband has no right to deal with the wife's property, and if the wife allows him to do so notwithstanding the provisions of the antenuptial contract, or allows him to incur any obligation towards her, she will be

²⁸ *Boyes v. Verzigman*, 9 Buch. 229.

²⁹ Voet, 23: 4: 70; G. 2: 12: 11; V. D. K., Th. 251; Schorer, Note 24, last paragraph, and Note 103.

³⁰ Voet, 23: 4: 28; 23: 5: 7.

³¹ Voet, 23: 5: 7.

³² *Boyes v. Verzigman*, 9 Buch. 229; *Van Eeden v. Kerstein*, Kotze, 184. Trustees are sometimes appointed to the wife's property, as to the effect of which see *Nel v. Olivier*, 19 S. C. 8.

in the same position as any other concurrent creditor of the husband, and will not be entitled to any legal hypothec or any other preference over the husband's estate.³³

Instead, however, of excluding the marital power altogether, it may be provided that, community of property and of profit and loss or community of property alone being excluded, the wife's property shall be secured to her, and in addition, that the husband shall be prohibited from alienating, mortgaging, pledging, or in any other way dealing with the same either absolutely or except with the wife's written consent.³⁴

If in the latter case the husband, notwithstanding such prohibition, alienates the wife's property, such alienation will be void, and the wife will be entitled to recover back the property alienated by *vindicatio* even from an innocent third party.³⁵ Nor will prescription run against the wife's right of action during the marriage, she being a minor under the guardianship of the husband and prescription not running against minors, but, if she allows the period of prescription to elapse after the dissolution of the marriage without suing, she will be barred.³⁶ If it is merely provided that the wife's property shall be secured to her, the wife will not be entitled to the right of *vindicatio*, but will be entitled to a tacit legal mortgage upon the husband's estate for the value of the property alienated by him.³⁷

It follows that the wife's own property will be

³³ *Ruperti's Trustees v. Ruperti*, 4 S. C. 22; *Mostert's Trustees v. Mostert*, *ibid.* 35; *Union Bank v. Spence*, *ibid.* 339.

³⁴ *Morkel v. Holm*, 2 S. C. 57; Voet, 23: 4: 20.

³⁵ Voet, 23: 2: 63; 23: 4: 21, 50; 23: 5: 7: R. Obs., part 1, obs. 12. See also p. 40, above.

³⁶ Voet, 23: 5: 8.

³⁷ Voet, 23: 2: 63; 23: 5: 7; Schorer, Note 23. See also p. 41, above.

quite safe against any claim by the husband's creditors.³⁸

The wife will also in such a case be entitled to a tacit hypothec over the husband's property in security of her property, giving her a preference over all her husband's creditors, whether mortgage or concurrent, whose claims have arisen during the marriage, but not over creditors who had before the marriage acquired a conventional special mortgage of immovable property or a legal mortgage.³⁹

Where, however, credit has been given for necessities supplied to the family *stante matrimonio*, Voet lays it down that such creditor will be preferred to the wife, who at the dissolution of the marriage will be liable for half of the debt, saving to her her recourse against the husband's estate, giving as his authorities Groenewegen's *De Legibus Abrogatis*, Code 4 : 12, § 4, and two decisions quoted in the *Hollandsche Consultatiën*.⁴⁰ It may, however, be as well to point out, as regards Groenewegen, that he is not there laying down the law with respect to the case in which the wife's property has been secured against alienation by the husband, but merely where community of property and of profit and loss have been excluded, and it does not appear from the decisions quoted by him and in the *Hollandsche Consultatiën*, that they would extend the rule laid down beyond this latter case. Nor does it appear which of the spouses it was who in those cases purchased the necessities, or to whom credit was

³⁸ *In re E. L. Chiappini*, 2 Buch. 150; *Steyn v. Trustee of Steyn*, 4 Buch. 16; *Aschen's Executrix v. Blythe*, 4 S. C. 136.

³⁹ *Rupert's Trustees v. Rupert*, 4 S. C. 22; *Aschen's Executrix v.*

Blythe, 4 S. C. 136; Act 21, 1875, sec. 10; Voet, 23 : 2 : 2, 63; 23 : 3 : 1; 23 : 4 : 52.

⁴⁰ Voet, 23 : 4 : 52; 3 Holl. Cons., Appendix, p. 39.

given; and in a case in the Eastern Districts Court,⁴¹ where necessities were bought by the husband and credit given to him, it was decided that at any rate a judgment obtained upon such debt against the husband could not be executed against the wife's separate estate.

Very closely akin to the contract by which the wife's property is secured to her, is the agreement whereby the wife reserves to herself the right of electing at the dissolution of the marriage whether she will share in the profit and loss accruing during the marriage, or whether she will repudiate these and claim restitution of her own property, in which case she will have the same right of preference as mentioned above.⁴² Whether in such a case the right of election passes to the wife's heirs is not quite clear.⁴³ Voet is of opinion that a distinction must be drawn between the case of a conflict between the wife's heirs and the creditors of the husband and that of a conflict between the wife's heirs and the husband's heirs. In the former case, if the wife's heirs are ascendant or collateral relations, or strangers, they will not be entitled to the right of election; but if they are descendants they will. In the latter, that is, where the conflict is between the heirs of the husband and wife respectively, the wife's heirs will be entitled to the right of election even if they are strangers.⁴⁴

Where, however, the wife has stipulated to have her property secure or for the above-mentioned right of election, there will be nothing to prevent her becoming a surety for her husband, and thus becoming

⁴¹ *Smith v. Dewdney Brothers*, 24; R. Obs., part 1, obs. 34; V. D. L. 4 E. D. C. 21.

⁴² Voet, 23: 4: 52; G. 2: 12: 10; V. D. K., Th. 250; Schorer, Note

25.

⁴³ Voet, 23: 4: 54.

⁴⁴ *Ibid.*

liable for his debts, provided she has renounced the necessary benefits.⁴⁵

A contract that the wife shall in any case have her own property secured to her, and, in addition, be entitled to half of the profits accruing during the marriage, will give the wife no preference over other creditors of the husband, but will only give her a right of action, after the other creditors have been satisfied, against the husband or his heirs for the fulfilment of the contract.⁴⁶ The same rule will apply to a contract which provides that the wife's property shall be secured to her, but that it shall be kept in repair and improved during the marriage at the husband's expense, without his being entitled to claim an account of such expenditure at the dissolution of the marriage.⁴⁷

It may, however, validly be stipulated that there shall be no community of property or of profit and loss, and that the wife's property shall be secured to her, but that the husband shall at the same time be entitled to the income derived from the wife's property during the marriage.⁴⁸

Short of the prohibition of alienation, of which we have treated thus far, the community may be limited in any manner and to any extent whatsoever, either party being entitled, in addition, to stipulate for some special benefit for him or herself.⁴⁹ The contract may consequently provide for the exclusion both of the community of property and of that of profit and loss,⁵⁰ or for the exclusion of the community of property alone,

⁴⁵ *Nourse v. Steyn*, 1 Menzies, 23 ; Voet, 23 : 4 : 56.

⁴⁶ *In re Chiappini*, 2 Buch. 151 ; Voet, 23 : 4 : 57.

⁴⁷ Voet, 23 : 4 : 57.

⁴⁸ *Anderson v. Meyer and others*, 1 Menzies, 204.

⁴⁹ G. 2 : 12 : 9 ; V. D. K. Th. 247-249.

⁵⁰ Voet, 23 : 3 : 1 ; 23 : 4 : 52.

leaving the community of profit and loss to continue between the spouses.

Where the wife is possessed of property of her own at the time of the marriage, and wishes to retain it for herself, it is advisable to annex a schedule of the wife's movable property to the contract; but this is not essential, and is required more for the purpose of facility of proof in case of disputes subsequently arising, proof *aliunde* as to the wife's ownership being admissible in the absence of such schedule.⁵¹

Where the community of property and of profit and loss have both been excluded, but without any stipulation securing the wife's property against alienation or encumbrance by the husband, and the husband alienates or mortgages the wife's property, she will have no remedy as against the person to whom such property has been alienated or mortgaged, nor will she be entitled to a tacit hypothec over the husband's estate for the value of such property or the amount of such mortgage.⁵² Her only remedy will be a claim for compensation against the husband's estate at the dissolution of the marriage, but such claim will have to be postponed to those of her husband's creditors; and if at the dissolution of the marriage her property be found intact and unencumbered, it will be free from all liability for the husband's debts, whether contracted during the marriage or before.⁵³

Where community of property alone is excluded, it may be stated generally that each spouse retains as his or her exclusive property whatever property or rights to property had vested in him or her at the time of the

⁵¹ *Boyes v. Verzigman*, 9 Buch. 231; *Van der Merwe v. Turton & Juta*, Kotze, 155.

4 S. C. 22; *Aschen's Executrix v. Blythe*, *ibid.* 136; *In re Chiappini*, 2 Buch. 143.

⁵² *Rupert's Trustees v. Rupert*,

⁵³ Voet, 24: 3: 21.

marriage. If it cannot be clearly proved to which of the spouses any particular property belonged, it will have to be regarded as common property.⁵⁴

Where the right to acquire a thing was vested in one of the spouses before marriage, but the actual acquisition only takes place during the marriage, the property so acquired will be excluded from the community,⁵⁵ even though the acquisition may have involved the expenditure of some money during the marriage.⁵⁶ Consequently, where land has been bought by one of the spouses before, but transfer is only obtained after marriage, such land will be the separate property of the spouse who purchased it, even though the price may have been paid out of the common moneys of the spouses during the marriage, and though the sale was subject to a condition as to time or otherwise which was not fulfilled until after the marriage.⁵⁷

Everything which may fairly be included under the term "profits" or "acquests," and which accrues or is acquired during the marriage, will be common.⁵⁸ Under the term "profits" is included profits derived from business, property acquired by *occupatio*, the fruits or increase of property and interest derived from investments, timber, minerals, metals, and precious stones derived from land belonging to either of the spouses, as also annual rent-charges payable upon the same, and generally all that is included under the term "fruits," and which goes, as a rule, to the usufructuary.⁵⁹ Increases in the property itself, however, are not regarded as falling under the term "profits," and that whether such increase is extrinsic of the property, such

⁵⁴ Voet, 23 : 4 : 31.

⁵⁵ Voet, 23 : 4 : 40, 41, 42, 47.

⁵⁶ Voet, 23 : 4 : 42.

⁵⁷ *Ibid.*

⁵⁸ Voet, 23 : 4 : 28.

⁵⁹ Voet, 23 : 4 : 32; Schorer, Note 104; G. 2 : 12 : 12; V. D. K., Th. 253.

as alluvion or islands formed in rivers, by the action of natural causes, opposite to land belonging to either spouse, etc., or intrinsic, such as an increase in the value of the property.⁶⁰ It is otherwise where the alluvion has been brought about by artificial means.⁶¹

If at the date of the marriage one of the spouses has the bare ownership of property, but not the usufruct, and afterwards acquires the usufruct during the marriage, such usufruct will not be common, but will belong to the spouse who has the ownership, though the fruits themselves derived from such property during the marriage will be common.⁶²

All property, movable as well as immovable, bought during the marriage in the joint names of the spouses, will be common, and that whether the money paid for the same was the joint property of the spouses or belonged to only one, but was spent in such a way as to make the spouse to whom it belonged the creditor of the other.⁶³ Nay, even where the husband has purchased immovable property for himself, and had the same transferred into his own name alone, he must be presumed to have done this by virtue of his marital power, and to have intended to acquire the property for the common account.⁶⁴

Where property is bought with money contributed by either of the spouses towards the support of the marriage, such property will be common; but at the dissolution of the marriage there will have to be repayment of the money so contributed and so invested, and the property itself being common, will have to be divided equally, unless, indeed, the husband has expressly

⁶⁰ Voet, 23: 4: 47.

⁶¹ *Ibid.*

⁶² Voet, 23: 4: 32.

⁶³ V. D. K., Th. 254.

⁶⁴ Voet, 23: 4: 33.

stated that he bought the property for the wife with her money as an investment, so that the property might take the place of the money. The same rule applies where the husband has sold his own or his wife's immovable property and bought other immovable property with the price, or has exchanged his own or his wife's immovable property for other immovable property; that is to say, the newly acquired property will be common, unless anything to the contrary is expressly declared, but the original property will have to be accounted for at the dissolution of the marriage.⁶⁵ In either case it makes no difference whether the newly acquired property is a single thing or a *universitas rerum*, such as the estate of a deceased person.⁶⁶

Whether property acquired by either of the spouses in this case during the marriage by way of inheritance, legacy, or donation, is common, is a matter of doubt. Very many authorities are of the opinion, according to Voet,⁶⁷ that such property does not come under the term "acquests," but he himself is of opinion that a distinction must be drawn between the case where the property is derived from a stranger and where it is derived from a blood relation, to whom the spouse acquiring it might succeed *ab intestato*. In the former case the acquisition will be for the common benefit,—in the latter, not. In the latter case, however, it is not absolutely necessary that the spouse acquiring the property should be actually in the position of heir *ab intestato* to the person from whom the property is inherited, as long only as he might be so if all intervening blood relations failed.⁶⁸ It must be

⁶⁵ Voet, 23 : 4 : 35, 44.

⁶⁶ G. 2 : 12 : 11; V. D. K., Th. 252; Schorer, Note 103.

⁶⁷ Voet, 23 : 4 : 43.

⁶⁸ *Ibid.*

observed, however, that these rules only apply where there is any doubt as to the intention of the testator or donor, for where it is clearly the intention of the testator or donor that his bequest or gift shall be included under the community of acquests, his will will have to be carried out.⁶⁹

If it is provided by antenuptial contract that "the goods contributed for the support of the marriage shall after the dissolution thereof return to the side from which it came," without any mention being made of goods which may afterwards come to either spouse by way of inheritance, all inheritances, legacies, and donations coming to either spouse during the marriage will be common to the spouses, on the principle *exclusio unius est inclusio alterius*, for the expression "contributed to the marriage" does not cover property afterwards acquired.⁷⁰

Under the community of loss, which obtains between the spouses where community of property alone has been excluded, will fall all debts contracted during the marriage, but not such as were already due and owing at the time of the marriage.⁷¹ Loss suffered by the destruction, diminution, deterioration, and depreciation of the separate property of either spouse, whether movable or immovable, does not come under the community, but falls upon the spouse to whom such property belongs.⁷²

As between the spouses themselves, it may validly be stipulated that one of them is to bear all the burdens of the marriage, and that the other shall not be responsible for the debts contracted during the

⁶⁹ Voet, 23 : 4 : 45.

⁷⁰ Voet, 23 : 4 : 46.

⁷¹ *Anderson v. Meyer and others*,
1 Menzies, 204; Voet, 23 : 4 : 48,

50; V. D. K., Th. 255.

⁷² Voet, 23 : 4 : 49; 24 : 3 : 21,
in fine.

marriage; but this will not prevent the latter from being sued by the creditors, though it will give him or her a recourse against the former or his or her heirs.⁷³

Where the marital power or the community of property has been excluded by antenuptial contract, the husband may, under certain circumstances, be liable for loss caused to the wife by his fraud or negligence in dealing with her property. On this point the following general rules may be laid down.

Where the marital power has been absolutely excluded, the husband is in the same position as any stranger as regards both fraud and negligence.⁷⁴

Where the marital power has not been excluded, but it has been provided by antenuptial contract, excluding community of property and of profit and loss, that the wife's property shall be restored to her intact and that the husband shall have no right to alienate the same,⁷⁵ the husband will be bound to make good all loss or damage to the wife's property due to his fraud or negligence, and the wife will be entitled to a tacit hypothec for the same over the husband's estate.⁷⁶

In the absence of such a clause as just mentioned securing the wife's property, she will be entitled to compensation out of the husband's estate, but her claim will be postponed to that of all other creditors of the husband.⁷⁷

The same is the case where community of property has been excluded but community of profit and loss

⁷³ Voet, 23 : 4 : 53; G. 2 : 12 : 9; V. D. K., Th. 249.

⁷⁴ *Ruperti's Trustee v. Ruperti*, 4 S. C. 22; *Mostert's Trustee v. Mostert*, *ibid.* 35.

⁷⁵ Prescription will not run against the wife during the subsistence of the

marriage with respect to the property so wrongfully alienated by the husband (Voet, 44 : 3 : 11).

⁷⁶ Voet, 23 : 3 : 19; 23 : 2 : 63; 23 : 5 : 7.

⁷⁷ Voet, 24 : 3 : 21; G. 2 : 12 : 15.

remains. In that case the wife's property brought by her into the marriage will be restored to her at the dissolution of the marriage, and if any portion thereof has been destroyed or damaged through the fraud or negligence (*culpa levis*) of the husband, such loss will have to be made good out of the acquests and profits before the division of the same, or, if there be none, will have to be compensated out of the separate estates of the spouses in equal shares, because, as already shown, all loss due to fraud and negligence on the part of the husband falls in such a case under the community of profit and loss.⁷⁸ Loss and damage due to accident merely will in such a case have to be borne by the spouse to whom the lost or damaged property belonged, and will not come under the community of profit and loss.⁷⁹

It is different where there is community of property between the spouses, for in that case at the dissolution of the marriage the estate will, after payment of all the debts, have to be divided equally between the spouses, without any question of compensation for damage due to fraud or negligence.⁸⁰ If, however, either of the spouses has during the marriage and in contemplation of a divorce fraudulently made away with any of the property belonging to the joint estate or the other spouse, an action will upon the dissolution of the marriage lie at suit of the latter or his or her heirs for the recovery of such property, and that not only where by antenuptial contract the wife's property has been specially secured to her, but even where there has been community of property and of profit and loss between the spouses.⁸¹

⁷⁸ Voet, 24 : 3 : 21.

⁷⁹ *Ibid.* ; V. D. K., Th. 257.

⁸⁰ Voet, 24 : 3 : 21.

⁸¹ Voet, 25 : 2 : 7.

An antenuptial contract may, in addition to provisions, such as those considered in previous articles, for the alteration or exclusion of the common law consequences of marriage, contain special stipulations for the benefit of one or other of the parties in the form of marriage settlements. To such settlements other persons besides the intending spouses may be parties, *e.g.*, where a parent or other relation or friend makes a settlement upon either or both of the spouses or upon the children of the intended marriage, or arranges for the succession of such spouses to his or her property, in which case the agreement will be binding upon such third party and give rise to an action for specific performance or compensation in case of default.⁸² Such a settlement by a third party will be irrevocable, even though the property settled may only be claimable after the death of the settler.⁸³

A donation made under such circumstances by one spouse to the other in his or her absence will not require express acceptance, such acceptance being implied from the conduct of the donee in subsequently entering into the marriage.⁸⁴

Before the enactment of Act 21 of 1875 the law of this Colony with respect to marriage settlements was regulated by the Placaat of the Emperor Charles V., of Oct. 4, 1540, sec. 6,⁸⁵ which apparently merely laid down what had previously been the law throughout a great part of the Netherlands.⁸⁶ This section reads as follows: "Whereas many merchants take upon them-

⁸² *Pillans v. Porter's Executors*, 5 S. C. 420; Voet, 23: 4: 69; V. D. K., Th. 245.

⁸³ Voet, 39: 5: 4, in fine.

⁸⁴ Voet, 39: 5: 11.

⁸⁵ Groot Placaatboek, vol. 1, col.

315 (see Appendix II.). *In re Chiappini*, 2 Buch. 149.

⁸⁶ *In re Chiappini*, 2 Buch. 150; *Paterson's Marriage Settlement Trustees v. Paterson's Trustees*, *ibid.* 95, and 7 Moore's P. C. C., N. S. 233.

selves to constitute in favour of their wives large dowers and excessive gifts and benefits out of their property, as well in consideration of marriage as to secure their property with their aforesaid wives and children, and afterwards are found unable to pay and content their creditors—whereupon their wives and widows wish to be preferred before all creditors, to the great injury of the course of commerce: we will and ordain that the aforesaid wives, who henceforth shall contract marriage with merchants, shall not be entitled to pretend to, to have or to receive any dower or any other benefit out of the property of their husbands, or to take part or share in the acquisitions made *stante matrimonio* by the husband,—even in cases where property has been actually transferred or specially mortgaged (*al waar't zoo dat zij ge-erft ofte beleend waren*)—until such time as all the creditors of their aforesaid husbands shall have been paid and satisfied, whom we will in this respect to be preferred before the aforesaid wives or widows,—saving to the latter their right of preference, to which they are entitled by reason of their marriage portion brought by them into the marriage or obtained by them through gift or succession from their friends and relatives;” and, though it makes express mention only of *merchants*, it was held to be of general application, even in the case of husbands who were not merchants,⁸⁷ but not to apply to settlements in favour of children.⁸⁸

The above section of the Placaat has been repealed by Act 21 of 1875, which now regulates the law

⁸⁷ *In re Chiappini*, 2 Buch. 150; *Steyn v. Trustee of Steyn*, 4 Buch. 16; *Hurley v. Palier*, 1 S. C. 154; *Glynn v. Van der Byl & Co.*, 4 Searle, 117; *Curator of Van der Merwe v. Van*

der Merwe, Kotze, 148.

⁸⁸ *Paterson's Marriage Settlement Trustees v. Paterson's Trustees*, 2 Buch. 95; *Brown v. Day and Anderson*, 12 Cape L. J. 138.

with respect to marriage settlements under antenuptial contracts.

Marriage settlements, then, may provide either (1) for the immediate settlement of property, movable or immovable, by one of the intended spouses upon or for the benefit of the other, or upon or for the benefit of the children of the marriage or their descendants, or (2) for the payment, out of the estate of the spouse making the settlement, at his or her death or at any other time⁸⁹ of any sum of money or annuity, or for making any other provision for the benefit of the other spouse or of the children of the marriage or their descendants.⁹⁰

In the first case mentioned, that is, of the immediate settlement of property, the settlement will be valid against all future creditors of the settling spouse, and also against creditors whose debts or demands existed at the date of the registration of the antenuptial contract, unless in the latter case the estate of the settling spouse is sequestrated as insolvent within two years of the execution of such contract, and it is then proved that the contract was made by the insolvent with intent to defraud or delay his or her creditors in obtaining payment of their debts.⁹¹

In the second case, that is, of a payment or provision to be made at a future date, the settlement will be absolutely valid if, and in so far as, it is secured by a special conventional hypothecation.⁹² Where this is not the case, transfers, etc., made under such settlements may, under certain circumstances, be impeached.⁹³ Where, for instance, a payment, transfer, alienation,

⁸⁹ Voet, 24: 3: 23.

⁹⁰ Act 21, 1875, secs. 3, 4.

⁹¹ *Ibid.*, sec. 3.

⁹² *Ibid.*, sec. 4.

⁹³ *Ibid.*

cession, delivery, mortgage, pledge, or other act is made, given, or performed in order to carry out such antenuptial contract, and the estate of the settling spouse is subsequently sequestrated as insolvent, such payment, transfer, etc., will be of no force or effect against or in competition with creditors whose debts or demands existed at the date of such payment, transfer, etc., if it be proved that it was made with intent to defeat or delay such creditors in obtaining payment of their debts,⁹⁴ and at a time when the liabilities of the settling spouse, fairly calculated, exceeded his or her assets, fairly valued; provided, however, that no such payment, transfer, etc., shall be liable to be impeached or invalidated after five years from the making thereof.⁹⁵

The law here laid down applies even to antenuptial contracts executed before the passing of Act 21, 1875, except as regards creditors whose debts or demands were in existence at the time of the taking effect of the Act, which will have to be paid in full before any claims under the antenuptial contract can be set up.⁹⁶

Where property was delivered by the husband to the wife after marriage, but in pursuance of the terms of an antenuptial contract, and it was proved that the husband was solvent both at the date of the contract and of the delivery, it was held, in an action by the husband's trustees in insolvency against the wife for the recovery of the property in question, that sec. 4 of Act 21, 1875, did not apply, inasmuch as the husband was not insolvent at the time of the delivery, nor was sec. 3 applicable, the Court not being satisfied that the settlement was made by the husband with intent to

⁹⁴ *Re Gerds's Estate*, 6 E. D. C. 5.

⁹⁶ *Ibid.*, sec. 5.

⁹⁵ Act 21, 1875, sec. 4.

defraud or delay his creditors in obtaining payment of their debts.⁹⁷

Where it has been agreed under an antenuptial contract that a life policy is to be ceded and that the premiums due thereon are to be paid by the settling spouse, no payment of premium made in pursuance of such agreement is liable, in the event of the insolvency of such settling spouse, to be upset under secs. 83 or 84 of the Insolvent Ordinance No. 6, 1843.⁹⁸

A provision in an antenuptial contract settling a sum of money upon a wife, which shall be a preferent claim upon her husband's estate in the event of his insolvency, is null and void as being in fraud of and opposed to the Insolvent Ordinance, which provides that all an insolvent's assets shall vest in his trustees for the benefit of his creditors.⁹⁹

A settlement of a sum of money by the husband upon the wife, which shall be payable upon his death, entitles the wife, upon the insolvency of the husband, to prove the amount upon his estate as a contingent claim.¹⁰⁰

Where an antenuptial contract provided that the husband should cede a certain specific policy of insurance upon his life to his wife, leaving the husband the management of the wife's property, but subject to the proviso that he should not alienate, pledge, etc., his wife's property without her written consent, the Court held that the assignment to the wife contained in the antenuptial contract, coupled with the deliveries, actual and constructive, of the policy, amounted to a valid cession of the policy to her, as against a creditor to

⁹⁷ *Louw's Trustee v. Louw*, 4 S. C. 420.

⁹⁸ Act 21, 1875, sec. 6. See also Act 31, 1891, sec. 17 *et seqq.*

⁹⁹ *Trustees of Leigh v. Leigh*, 1 S. C. 75.

¹⁰⁰ *Ibid.*

whom the husband had subsequently ceded the policy without her consent, although there was no formal endorsement on the policy itself of the cession to the wife.¹⁰¹

Where an antenuptial contract provided that certain property, settled upon the wife and vested in trustees for her benefit, should not be realized or transferred without the wife's written consent, it was decided that a transfer made by the trustees without such consent was invalid.¹⁰²

An indirect form of marriage settlement is that whereby the succession to the property of either spouse or of a third party is regulated.¹⁰³ In this way provision is often made for the succession of the spouses to each other, or, in default, that the property shall devolve upon the children of the marriage or a third party, either simply or burdened with *fideicommissum*.¹⁰⁴ In fact, the intending spouses and third parties to the contract have the same liberty of disposing of the succession to their property by antenuptial contract as by will.¹⁰⁵

An antenuptial contract once duly entered into and become effectual by the subsequent marriage of the parties cannot afterwards be revoked or altered during the marriage even by agreement between the spouses themselves,¹⁰⁶ seeing that any such alteration would either amount to a donation between husband and wife,¹⁰⁷ which is forbidden by our law, or to an agreement

¹⁰¹ *Morkel v. Holm*, 2 S. C. 57.

¹⁰² *Hall v. Hall's Trustee*, 3 S. C. 3.

¹⁰³ Voet, 23 : 4 : 57, 67.

¹⁰⁴ Voet, 23 : 4 : 57, 61 ; V. D. K., Th. 236 *et seqq.*

¹⁰⁵ Voet, 23 : 4 : 59.

¹⁰⁶ When a question arises as to he right to alter or to revoke an antenuptial contract, the law of the

domicile of the spouses is to be observed with respect to movables, but with respect to immovables, the law of the place where such immovables are situate (Voet, 23 : 4 : 69).

¹⁰⁷ Voet, 23 : 4 : 59, 62 ; 24 : 1 : 13 ; Groen., De Leg., C. 4 : 29 : 11 ; V. D. K., Th. 264 ; V. D. L. 77.

with respect to the inheritance of a living person, which, except in the case of an antenuptial contract, is also forbidden by our law.¹⁰⁸ Even where neither of these is the case, but it is provided that property belonging to the wife shall be vested in trustees for her sole and separate benefit, it has been held that the wife will have no power to revoke such trust, or claim possession of such property for herself, even though the husband may consent to such revocation.¹⁰⁹

There is nothing, however, to prevent two spouses from revoking or altering their antenuptial contract by mutual last will, and by this means introducing community of property where it was excluded by the contract, or *vice versa*, or to increase or diminish the share which it was agreed that each should have in the inheritance of the other.¹¹⁰ But in such a case either of the spouses is at liberty, if he thinks it to his interest, to adhere to the provisions of the antenuptial contract, by declaring his or her intention to that effect in a later separate will, even during the lifetime and without the knowledge of the other spouse, or by repudiating the provisions of their joint will after the death of the first-dying, provided he has not yet taken any benefits under such will.¹¹¹

If the spouses have by antenuptial contract appointed not each other but third parties as their successors, then, provided such third parties have not been parties to the contract, there is nothing to prevent the spouses from altering such disposition by mutual last will, whether the appointment was made in general terms, *e.g.*, by providing that at the dissolution of the

¹⁰⁸ Voet, 23 : 4 : 59.

¹⁰⁹ *Buissonne and another v. Mulder et Uxor*, 1 Menzies, 162; *Buysskes v. Russouw's Executors*, 5 Buch. 19.

¹¹⁰ Voet, 23 : 4 : 62; V. D. L. 77.

¹¹¹ Voet, 23 : 4 : 62; V. D. K., Th. 265; V. D. L. 77.

marriage the property has to return to the side from which it came, or whether certain specified individuals were indicated as the persons to whom the property is to go at the dissolution of the marriage.¹¹² One of the spouses, however, is not entitled to alter the mode of succession laid down by the antenuptial contract either by act *inter vivos* or by last will.¹¹³ But where it is provided by antenuptial contract that after the death of the survivor the property of the spouses is to be divided into two equal shares, one-half going to the relations of the husband and the other to those of the wife, such provision may not only be altered by the mutual consent of the spouses either by act *inter vivos* or by joint will, but the survivor will be entitled after the death of the first-dying to dispose of his share of the property by will as he pleases, provided he does not interfere with the dispositions made by the first-dying in the antenuptial contract in favour of his or her relations.¹¹⁴

Again, where the succession has been regulated in favour of third parties who are parties to the contract, such disposition cannot afterwards be altered by either one or both of the spouses without the consent of such third parties, seeing that this is not merely a case of a testamentary disposition which can be revoked at any time, but that a valid contract has been entered into between the spouses and the third parties which cannot be cancelled without the consent of all the parties to the same.¹¹⁵

It may happen, also, that the succession to a third party, who was a party to the contract, is regulated

¹¹² Voet, 23 : 4 : 63, 66.

¹¹³ Voet, 23 : 4 : 62 ; V. D. K., Th. 235.

¹¹⁴ Voet, 23 : 4 : 63.

¹¹⁵ Voet, 23 : 4 : 64 ; V. D. K., Th. 239.

by the antenuptial contract, in which case such disposition cannot be revoked by such third party without the consent of the spouses, and sometimes, *e.g.*, where the children of the marriage are interested, not even with such consent.¹¹⁶

Outside the above-mentioned cases, an antenuptial contract cannot be cancelled or set aside except by a decree of Court, and it will be regarded as valid and binding until so set aside.¹¹⁷

A donation made in contemplation of marriage will have to be returned if the marriage does not actually take place.¹¹⁸

As already pointed out above,¹¹⁹ it will be so set aside in the case of the marriage of a minor without the consent of parents or guardians in so far as any benefits are therein stipulated for by the other spouse. It may also, like any other contract, be set aside on the ground of fraud,¹²⁰ but not merely on the ground that one of the parties thereto has failed to carry out his part of the contract.¹²¹

Marriage settlements may also, as shown above,¹²² be set aside under certain circumstances at the instance of creditors, in the event of the subsequent insolvency of the settling spouse.

¹¹⁶ Voet, 23 : 4 : 67; V. D. K., 290.
Th. 246.

¹¹⁷ *Buissinne and another v. Mulder et Uxor*, 1 Menzies, 165.

¹¹⁸ G. 3 : 2 : 20; Schorer, Note

¹¹⁹ See p. 24, above.

¹²⁰ Act 21, 1875, sec. 11.

¹²¹ Voet, 23 : 4 : 22.

¹²² See pp. 68-70, above.

CHAPTER VII.

JUDICIAL SEPARATION.

WHEN a marriage has once been duly contracted,¹ it cannot afterwards be dissolved or even suspended as to

¹ Proof of Marriage. — In any action for judicial separation or for dissolution of a marriage, or in which the relations of the two married persons are concerned, or in which the validity of a marriage is in dispute, *e.g.*, where the legitimacy of children is in question, the marriage will have to be proved to the satisfaction of the Court (*Lehane v. Lehane*, 1 Menzies, 267; *Cræser v. Cræser*, *ibid.* 257; *Schlechtting v. Schlechting*, 5 Buch. 26; *Knight v. Knight*, 14 E. D. C. 162; *Levy v. Levy*, 18 E. D. C. 164; *Hill v. Hill*, (1906) T. S. 101.

For the purpose of preserving evidence of marriage and for facilitating the proof of the same, it has been enacted that a Marriage Register is to be kept by all Ministers of Religion, Magistrates, and other Marriage Officers, wherein, immediately after the solemnization of every marriage, an entry of such marriage is to be made, setting forth all the material particulars of such marriage (*Order in Council*, Sept. 7, 1838, sec. 21; *Act 16, 1860, Schedule A*, sec. 12). A Duplicate Original Register being a true copy of such Marriage Register, executed in the same manner as the latter, shall also be made and kept by the Minister, and shall be forwarded by him to the Colonial Office within one month (*Order in Council*, sec. 21; *In re Sowerby and wife*, 18 S. C. 232). In the case of a marriage before a Magistrate, a copy of the Register is to be made in the "Marriage Record Book" kept in the Magistrate's Office, and the Original Register is to be sent to the Colonial

Office (*Act 16, 1860, Schedule A*, sec. 12). If then afterwards it should become necessary to prove a marriage in Court, it will be sufficient to produce the Original Register or the Duplicate Original Register, or any copy of the same certified by the Minister, who has the lawful custody of it, or by the Colonial Secretary for the time being, which shall respectively be good evidence of the facts recorded therein (*Order in Council*, sec. 21; *Act 16, 1860, Schedule A*, sec. 12; *Nyshens v. Nyshens*, Kotze, 146), nor will it be necessary in the case of such a marriage to give any proof of the actual residence of the parties before the marriage, or that the banns were duly published or notice affixed, or that the marriage was duly solemnized in the place or within the hours prescribed by law, or that such publication and solemnization was made by the person by whom they ought to have been made (*Schlechtting v. Schlechting*, 5 Buch. 24; *Kicherer v. Kicherer*, 2 Searle, 81), nor will evidence be received to the contrary (*Order in Council*, sec. 18; *Act 16, 1860, Schedule A*, sec. 11). In the case also of a marriage of minors by banns, it will not be necessary to prove the consent of the parents or guardians, nor will any evidence be received to the contrary (*Act 16, 1860, Schedule A*, sec. 28).

But though the Marriage Registers and certified copies thereof will be sufficient evidence of the facts recorded therein, they will not be sufficient in themselves to prove that the marriage recorded is the marriage in question in the particular case, and evidence

its consequences except by the decree of a competent Court or by the death of one of the parties.²

The only Court which can decree any alteration in the relations between two married people, is the Court of the country in which they are *bonâ fide* domiciled at the time of the commencement of the action,³ and it will be the duty of such Court of its own motion and even though no exception to the jurisdiction has been taken by the defendant, to make inquiry into the question of jurisdiction, the mere consent of the parties, in questions involving their matrimonial *status*, not entitling the Court to a jurisdiction which it would otherwise not possess.⁴

A marriage may be temporarily suspended by a judicial decree of separation from bed, board, and cohabitation (*à mensâ et thoro*) and for the division of

aliunde will therefore be required to prove that the parties whose marriage is in question, are the parties mentioned in the Register. Parole evidence will consequently be required to identify the parties with the persons mentioned in the Register (*Rykie v. Rykie*, 1 Buch. 114; *Matomela v. Matomela*, 2 E. D. C. 12; *Prickett v. Prickett*, 1 Buch. 25; *Hodges v. Hodges*, 2 Buch. 299). Where by some oversight no Duplicate Original Register has been sent to the Colonial Secretary's Office, and the Original Register has become lost, the marriage will have to be proved by parole evidence (*Potter v. Potter*, 7 E. D. C. 148), and this is the course which was followed previously to the enactment of the Order in Council of Sept. 7, 1838 (*Hoffman v. Hoffman*, 1 Menzies, 281; *Kemball v. Kemball*, *ibid.*), and may still have to be followed with respect to marriages celebrated elsewhere than in the Colony (*Reeves v. Reeves*, 1 Menzies, 244).

As regards very ancient marriages,

marriage will in case of doubt be presumed from cohabitation, where children have resulted therefrom (*Voet*, 23: 2: 5).

² G. 1: 5: 18.

³ *Mason v. Mason*, 4 E. D. C. 336; *Weatherley v. Weatherley*, Kotze, 66; *Hawkes v. Hawkes*, 2 S. C. 109; *Reeves v. Reeves*, 1 Menzies, 244; *Wolter v. Wolter*, 11 E. D. C. 89; *Smith v. Smith and Nicholas*, 14 E. D. C. 11; *Murphy v. Murphy*, (1902) T. S. 179; *Crowder v. Crowder*, (1904) T. S. 227; *Le Mesurier v. Le Mesurier*, (1895) A. C. 517. In the case of *Murphy v. Murphy* ((1902) T. S. 179) it has been decided by the Supreme Court of the Transvaal that though it had no jurisdiction to dissolve a marriage between parties not domiciled there, it had jurisdiction to grant a decree of judicial separation, inasmuch as that would have no effect upon the *status* of the parties.

⁴ *Weatherley v. Weatherley*, Kotze, 66.

the joint estate in the case of community of property, such separation being usually spoken of briefly as a judicial separation.

Such a decree will not, even with the mutual consent of the parties, be granted except for just cause and after due inquiry by the Court as to the existence of such just cause and the *bonâ fides* of the parties.⁵

The grounds which will justify such a decree are that, owing to habitual cruelty or the ill-treatment of one spouse by the other, or continuous quarrels or dissensions between the spouses, or some other equally valid reason, the continued living together of the spouses has become insupportable or dangerous to the life of one or other of them.⁶ Thus it has been held that, though a wife or husband may reasonably be expected to bear with occasional outbursts of ill-temper, provided they are not accompanied by serious personal violence, occasional assaults, however slight, accompanied by habitual intemperance, will make cohabitation intolerable.⁷ Habitual intemperance, also, on the part of husband or wife, so long continued as to leave no hope or prospect of reform, as also outbursts of excessive drinking, not amounting to habitual intemperance, but rendering continued cohabitation intolerable, have been held to be a ground for granting a decree of separation.⁸ So also admissions by the husband to the wife of having been guilty of adultery coupled with serious assaults on several occasions and with the fact

⁵ *Willard v. Willard*, 6 E. D. C. 229; *Ex parte Guiney*, 2 Off. Rep. 30; *Du Preez v. Du Preez*, 18 S. C. 438; *Matthew v. Matthew*, 18 E. D. C. 50; *Herman v. Herman*, (1903) T. S. 808. But see *Van der Hove v. Van der Hove*, (1902) T. S. 317; *Bourne v. Bourne*, 9 E. D. C. 110; V. D. K., Th. 901; V. D. L. 39.

⁶ *Simey v. Simey*, 1 S. C. 171; *Van der Berg v. Van der Berg*, 1 Menzies, 241; Voet, 24: 2: 16; G. 1: 5: 20.

⁷ *Goldsworthy v. Goldsworthy*, 10 S. C. 139.

⁸ *Poggenpoel v. Poggenpoel*, 15 S. C. 37. See also *Taylor v. Taylor*, (1906) T. S. 358.

that the husband habitually used grossly indecent and disgusting language to his wife or was addicted to habitual intemperance and accustomed to use cruel taunts to the wife with respect to the woman with whom he had committed adultery, have been decided to afford grounds for judicial separation.⁹

An extra-judicial agreement for separation will be effectual as between the spouses themselves or their representatives, but will not bind creditors or other third parties who are not representatives of either of the spouses,¹⁰ unless such third parties had special notice before their claims arose of the existence of the separation and of its terms.¹¹ Such an agreement also will not be binding even upon the spouses themselves, unless circumstances existed at the date of the separation which would have justified the Court in granting a decree of separation, the reason of this being that such an agreement, being without legal consideration, would amount to a donation between husband and wife.¹²

The effect of a judicial decree of separation is to suspend for the time being all the rights arising out of the marriage, the marriage itself, however, with all its consequences, except in so far as these may have been modified by the decree, remaining in existence, and the parties being forbidden to enter upon another marriage.¹³ The Court may decree a division of goods between the spouses, but such division will not amount to a dissolution of the community of property between them, and consequently if the parties afterwards come

⁹ *Van Niekerk v. Van Niekerk*, 14 S. C. 178; *Wessels v. Wessels*, 12 S. C. 465; *Edmeades v. Edmeades*, 1 S. C. 173, footnote.

¹⁰ *Ziedeman v. Ziedeman*, 1 Menzies, 239; *Barker v. Barker*, 14 S. C. 113.

¹¹ *Scholtz v. Felmor*, 4 S. C. 192.

¹² *Albertus v. Albertus's Executors*, 3 Searle, 202.

¹³ *Wessels v. Wessels*, 12 S. C. 465; Voet, 24: 2: 16; G. 1: 5: 20; Schorer, Note 18.

together again, the community is revived.¹⁴ The decree is always indeed granted in the hope that the spouses may at some future time be reconciled and come together again, in which case all the former rights of the spouses revive.¹⁵

It follows, from the very nature of the decree, that after it is granted neither party can compel the other to live with him or her, or enforce any of the other rights which flow from marriage;¹⁶ but, if no order has been made regarding the property, each party retains his or her rights of property unimpaired. The community of property continues between the spouses who have been married without antenuptial contract, unless the Court orders a division of the property and a cessation of the community, and antenuptial contracts remain in force, unless the Court modifies them so as to suit the altered relations of the parties.¹⁷ It is, however, usual in an action for judicial separation to pray for an order of Court as regards the property, and in that case the plaintiff is entitled, in the case of community of property, to an order cancelling such community and for a division of the joint estate between the spouses,¹⁸ and, in the case of a marriage by antenuptial contract, to an order rescinding any antenuptial promise, which he or she may have made, of a gift to take effect on his or her death or at some other future date, but subject to the renunciation by him or her of any reciprocal promise made by the defendant in his or her favour.¹⁹ Benefits, however, which have already accrued to the defendant are not

¹⁴ *Neale v. Neale*, 20 S. C. 198;
G. 3: 21: 11.

¹⁵ G. 1: 5: 20; V. D. L. 90.

¹⁶ *Wessels v. Wessels*, 12 S. C. 465.

¹⁷ *Ibid.*; Schorer, Note 18.

¹⁸ *Ziedeman v. Ziedeman*, 1
Menzies, 238; *Pflugger v. Erasmus*,
17 S. C. 314.

¹⁹ Schorer, Note 18.

liable to forfeiture.²⁰ A further effect of a decree of separation is that the one spouse is freed from all liability for any debts contracted by the other spouse after the granting of the decree.²¹

Where a wife has obtained a judicial separation, owing to misconduct on the part of the husband alone, she will be entitled to claim from him suitable maintenance or alimony in accordance with her station in life and the means of the husband;²² but if the separation is due to faults on her side as well, or on her side alone, she will only be entitled to receive back her own property or her share in the community, from which she will have to maintain herself.²³

Alimony is a matter for the discretion of the Court, and that not an arbitrary but a judicial discretion, to be exercised according to established principles of law and upon an equitable view of all the circumstances of the particular case, such as the position in life of the parties, the husband's income, and the wants of the wife. Where immediately before or at the time of the trial of an action for separation the parties make an agreement as to the division of the estate and as to alimony, such agreement may be a fair guide in determining the matter; but it is quite a different thing when the agreement was made a considerable time before, and when the circumstances of the parties may have entirely changed in the interval. In either case, however, the question of alimony is one entirely for the discretion of the Court.²⁴

²⁰ *Wessels v. Wessels*, 12 S. C. 465; Voet, 23: 4: 22; *Gericke v. Gericke*, 14 E. D. C. 113.

²¹ *Ziedeman v. Ziedeman*, 1 Menzies, 238; Voet, 24: 2: 18.

²² *Gericke v. Gericke*, 14 E. D. C.

113; *Herman v. Herman*, (1903) T. S. 808.

²³ *Braude v. Braude*, 16 S. C. 565; Voet, 24: 2: 18; Schorer, Note 18.

²⁴ *Ibid.*

CHAPTER VIII.

THE DISSOLUTION OF MARRIAGE.

MARRIAGE is absolutely and completely dissolved by the death of one of the spouses, and it may also be set aside by the decree of one of the superior Courts of the Colony, upon sufficient cause being shown.¹

As regards a dissolution by death, it may be observed that such death must be actual, and not merely implied, for, though death may sometimes, for the purpose of facilitating the administration of estates, be presumed from long absence,² such presumption is always liable to be rebutted by the return of the absent spouse, and cannot be acted upon as though it amounted to an actual final dissolution of the marriage.³

A marriage may, for certain reasons, be declared null and void *ab initio* upon the application of one of the parties, or even against the will of both.⁴

It will be declared null and void against the will of both spouses whenever two persons related to each other within the forbidden degrees of consanguinity or affinity have entered into a marriage either knowingly or in ignorance,⁵ or in the case of a bigamous marriage, that is, where one of the spouses had been previously married to another person who was still alive.⁶ So also where a minister of religion, magistrate, or other marriage officer has been fraudulently induced to celebrate a marriage, one of the parties to which was a minor, without the consent of the parents of such

¹ G. 1: 5: 18.

² See Chapter xxxiii., n. 8, below.

³ Schorer, Note 8.

⁴ Voet, 24: 2: 15.

⁵ *Ibid.*

⁶ *Hatch v. Hatch*, 9 S. C. 1; *Cunningham v. Cunningham*, 5 Buch. 99.

minor, the marriage will be set aside upon the application of the parents.⁷

A marriage will be annulled upon the application of one of the spouses whenever the other spouse, whether husband or wife, was at the date of the marriage suffering from permanent impotence or incapacity to procreate children.⁸ Impotence, however, supervening after marriage, will afford no ground for the annulment of the marriage, as that would, like a contagious disease or insanity supervening afterwards, be one of those misfortunes which the spouses are supposed to bear in common.⁹

An action for annulment will also lie where the husband discovers after the marriage that his wife at the date of the marriage was not a virgin, or, if a widow, had during her widowhood had sexual connection with another man, with the result in either case that she was pregnant at the time of the marriage, unless the husband, after becoming aware of the facts, has condoned the matter by having connection with the wife or in any other way which in law will be regarded as amounting to condonation.¹⁰ Previous deflowerment, however, by itself and without pregnancy, would seem not to be sufficient ground for an action to annul a marriage.¹¹

Under our law there are only two legal grounds for divorce, namely, adultery and malicious desertion,¹² though, according to some text-writers, any other causes which can, by an extended interpretation,

⁷ See p. 22, above.

⁸ *Ngwande v. Ngwande*, 8 E. D. C. 68; Voet, 24: 2: 15; 25: 7: 9; G. 1: 5: 4; V. L., vol. 1, p. 122; Schorer, Note 52.

⁹ Voet, 24: 2: 16.

¹⁰ *Nel v. Nel*, 1 Menzies, 274.

¹¹ *Horak v. Horak*, 3 Searle, 389; Voet, 24: 2: 15; V. L., C. F., part 1: 1: 15: 10.

¹² Pol. Ord., April 1, 1580, sec. 18 (see Appendix I.); Voet, 24: 2: 5; G. 1: 5: 18; V. D. K., Th. 88.

be brought within the reasoning upon which divorce on the grounds of adultery and malicious desertion is based, will be held to afford equally good grounds for divorce. Thus the commission of an unnatural crime might be regarded as tantamount to adultery, while condemnation to death, even if commuted to lifelong imprisonment or avoided by escape from prison, and imprisonment for life,^{12a} might be regarded as tantamount to death or malicious desertion.¹³

By our law, as already stated, spouses are bound to observe perfect conjugal fidelity towards each other, and any voluntary breach of this duty by either of the spouses will, as a general rule, entitle the other to a decree of divorce. One voluntary act of adultery, therefore, will be sufficient ground for such a decree;¹⁴ but the act must be voluntary, and therefore a married woman who has been raped is not regarded as having committed adultery.¹⁵ Whether adultery committed whilst in a state of insanity will be excused on account of the defect of will is a question which has never been raised in our Courts in a contested case.¹⁶

Even long absence on the part of one of the spouses will not justify the other in entering into a second marriage to the extent of affording a good defence to an action for divorce,¹⁷ though it may possibly be a good defence to a claim for forfeiture of the marriage benefits, or to a prosecution on a charge of bigamy.¹⁸

Nor will malicious desertion by one of the spouses

^{12a} *Jooste v. Jooste*, Supreme Court, May 13, 1907; *Nefler v. Nefler*, High Court of the Orange River Colony, July 25, 1906.

¹³ V. D. K., Th. 88, 89; Schorer, Note 16; V. D. L. 89; Van der Linden's *Kerzameling van Merkwaardige Gewijsden*, vol. 1, gew. 32.

¹⁴ *Gibbon v. Gibbon*, 8 E. D. C. 91.

¹⁵ Voet, 24: 2: 5.

¹⁶ But see *Gibbon v. Gibbon*, 8 E. D. C. 91, and the English cases of *Yarrow v. Yarrow*, L. R. (1892), P. 82, and *Hanbury v. Hanbury*, *ibid.* 222.

¹⁷ Voet, 23: 2: 99.

¹⁸ *In re Booysen*, Foord, 187.

be a good defence to an action of divorce brought by such spouse on the grounds of adultery committed by the other spouse during such desertion,¹⁹ nor will refusal to cohabit,²⁰ nor judicial separation,²¹ nor such conduct as would have afforded good grounds for a judicial separation.²²

The only grounds upon which, according to the decisions of our Courts, a plaintiff can be deprived of his or her right to a divorce on the grounds of adultery are: (1) adultery on the part of the plaintiff, (2) collusion between the spouses, (3) condonation of, and (4) connivance at, the defendant's adultery by the plaintiff.²³

Divorce will, as a general rule, be refused whenever the plaintiff has also been guilty of adultery, whether before or after the issuing of the summons in the divorce suit;²⁴ but the Court may, under certain circumstances, grant the divorce, but indicate its condemnation of the plaintiff's conduct by making a special order as to the division of the property or as to costs.²⁵ In considering the conduct of the plaintiff, as well as in other respects, the Court is not tied down to the pleading, but is entitled of its own motion to inquire into the conduct of both parties and into the motive and *bonâ fides* or otherwise of the proceedings.²⁶ Hence collusion between the parties will always be fatal to an action for divorce, the Courts refusing to entertain such actions, if from the form of the pleadings or from the nature of the evidence adduced there is anything

¹⁹ *Farmer v. Farmer*, 1 Searle, 227; *Goodison v. Goodison*, 4 Buch. 143; *Richter v. Wagenaar*, 1 Menzies, 262; Voet, 24: 2: 10.

²⁰ *Hasler v. Hasler*, 13 S. C. 377; Voet, 24: 2: 7.

²¹ *Barker v. Barker*, 1 Menzies, 265.

²² Voet, 24: 2: 7.

²³ *Hasler v. Hasler*, 13 S. C. 377.

²⁴ *Heathershaw v. Heathershaw*, 5 Searle, 35; *Wiesel v. Wiesel*, 7 Buch. 92.

²⁵ *Weyers v. Stopforth*, 1 Menzies, 273.

²⁶ *Farmer v. Farmer*, 1 Searle, 227.

to induce the Court to believe that the proceedings are collusive between the husband and wife, for the purpose of procuring for the gratification of their own inclinations or convenience a dissolution of the matrimonial bond, which the law intends to be indissoluble as far as may be.²⁷

Where there is any suspicion of collusion between the spouses, the Court will sometimes take special steps so as to prevent the fraud, and to institute a thorough inquiry into all the circumstances. Thus, in the case of *Louw v. Louw*,²⁸ the Supreme Court, upon the application of the defendant's (the wife's) brother, appointed him *curator ad litem* to the minor children of the marriage, with permission to him to intervene as co-defendant in the action of divorce.

Condonation of the defendant's adultery or connivance thereat will also deprive the plaintiff of his or her right of action.

By condonation (*remissio injuriæ*) is meant where the plaintiff, with a full knowledge of the adultery, agrees to forgive the defendant and to be reconciled to him or her.²⁹ Such forgiveness may be conveyed not only in express words, but also by conduct, and may be gathered from facts and circumstances, *e.g.*, from sexual intercourse subsequent to a knowledge of the adultery.³⁰ Mere delay, however, in bringing an action will not amount to condonation,³¹ nor will forgiveness or reconciliation be presumed from the bare fact of subsequent cohabitation for two or three days, unless actual sexual intercourse is proved, the burden of

²⁷ *Farmer v. Farmer*, 1 Searle, 227; *Weatherley v. Weatherley*, Kotze, 66; *Juhre v. Juhre*, 4 E. D. C. 357.

²⁸ *Louw v. Louw*, 4 Buch. 41.

²⁹ *Weatherley v. Weatherley*, Kotze,

66; *Jones v. Jones*, 14 E. D. C., 81.

³⁰ Voet, 24: 2: 5; V. L., vol. 1, p. 117.

³¹ *Van Dyk v. Van Dyk*, 1 Menzies, 278.

proving such intercourse and the condonation generally being on the defendant.³² In the case of *Niemand v. Niemand*,³³ De Villiers, C.J., laid it down "that a decree of divorce should not be granted at suit of a husband who, knowing of his wife's adultery, continues to live under the same roof with her, although not cohabiting with her, under circumstances which would justify the belief that reconciliation has taken place. The same rule would apply to the wife who continues to live in the same house with an adulterous husband, but the circumstances which would justify the inference of a reconciliation would not necessarily be the same in both cases. A wife, more often than the husband, has no choice in the matter." Under the peculiar circumstances of that particular case the Court granted the wife her divorce, though she had continued to live in the same house with the husband for twelve years, during which time she was aware that he was living in adultery with another woman in the same house. She had not, however, had connection with him during that time, her excuse for her conduct and for her delay in bringing the action being that there were children of the marriage, and that she was poor, and would have had no place to take refuge in if she had left her husband's house. Again, where a wife, on ascertaining her husband's adultery, left him, and some time later it was mutually agreed between them that she should take over the management of a business owned by him and pay him a portion of the proceeds, and this agreement was carried out, but they did not live together or cohabit, this was held not to amount to condonation.³⁴

³² *De Wet v. De Wet*, 1 Menzies, 217.
268.

³³ *Niemand v. Niemand*, 15 S. C.

³⁴ *Jones v. Jones*, 14 E. D. C. 81.

By connivance is meant, where the plaintiff, by his acts or conduct, has either knowingly brought about or conduced to the adultery of the defendant ; or where the plaintiff has so neglected the defendant, and exposed her to temptation, that adultery might naturally have been expected under the circumstances, *e.g.*, where the plaintiff, having become aware of an improper intimacy existing between his wife and the co-respondent remains passive and permits the intimacy to continue, taking no steps to protect his wife or to avert the coming danger.³⁵

The declaration in an action for divorce must not be vague or embarrassing, but definite and distinct.³⁶

The adultery will, of course, in every case have to be proved to the satisfaction of the Court,³⁷ either by direct evidence or by circumstantial evidence sufficiently convincing to leave no reasonable doubt as to the guilt of the defendant. Thus the birth of a fully developed child to the defendant at a time which would make it impossible that it should be the child of the husband, having regard to the ordinary period of gestation and the date of actual or possible connection with the husband, will be sufficient evidence of adultery.³⁸

The mere confession of adultery by the defendant in Court, or his or her admission out of Court of the commission of such adultery, will not be sufficient to

³⁵ *Weatherley v. Weatherley*, Kotze, 94. For other cases as to condonation and connivance, see *Seaward v. Seaward*, 1 Searle, 247; *Finegan v. Finegan*, Kotze, 159; *Wasserfall v. Wasserfall*, 1 Menzies, 282; Voet, 24: 2: 5.

³⁶ *Launspach v. Launspach*, (1905) T. S. 7.

³⁷ *Wylde v. Wylde*, 1 Menzies, 269;

Roberts v. Roberts, 18 E. D. C. 52; *Chester v. Chester and Graham*, Hertzog, p. 160.

³⁸ *Horak v. Horak*, 3 Searle, 389; *Finegan v. Finegan*, Kotze, 159; *Wylde v. Wylde*, 1 Menzies, 269; *Richter v. Wagenaar*, 1 Menzies, 262; *Barker v. Barker*, 1 Menzies, 265; *Weyers v. Stopforth*, 1 Menzies, 273.

justify a decree of divorce, unless supported by other evidence.³⁹

Proof of the conviction of the defendant for rape by producing the record of such conviction will be sufficient *primâ facie* evidence to justify the Court in granting a decree in the absence of rebutting evidence.⁴⁰

Where a declaration in an action for divorce alleges acts of adultery between certain specified dates and the defendant is in default, the Court will not allow evidence to be led as to acts of adultery committed at other dates, nor will any amendment of the declaration to that effect be allowed without notice to the defendant.⁴¹

Malicious desertion of the wife by the husband, or of the husband by the wife, is also a good ground for divorce.⁴²

The procedure in this case is of a twofold character ; that is, first by way of a preliminary proceeding to obtain a restitution of conjugal rights, and then, in case of default, for a decree of divorce. To attain this object it was formerly necessary to bring two actions—first for the restitution of conjugal rights, and afterwards for the divorce,⁴³ on the ground of non-compliance with the order of restitution ; but these two actions have now been amalgamated into one by the 371st Rule of Court, which provides that in an action for the restitution of conjugal rights the plaintiff may at the same time claim a decree of divorce. Upon the hearing of the case the Court may then order the restitution, and may further direct the defendant to

³⁹ *Wylde v. Wylde*, 1 Menzies, 269 ; *Van Niekerk v. Van Niekerk*, 14 S. C. 178 ; *Cunningham v. Cunningham*, 5 Buch. 89 ; *Richter v. Wagenaar*, 1 Menzies, 262. But see *Bullen v. Bullen*, 14 E. D. C. 79.

⁴⁰ *Lawrence v. Lawrence*, 15 S. C. 251.

⁴¹ *Klaase v. Klaase*, 7 S. C. 157.

⁴² Voet, 24 : 2 : 9.

⁴³ *Mackay v. Mackay*, 1 Menzies, 256 ; *Le Roex v. Le Roex*, *ibid.* 255.

show cause, on a day to be named in such order, not being less than seven days after the day fixed for compliance therewith, why a decree of divorce shall not be granted. If upon such return day it shall be proved, by affidavit or otherwise, that the defendant, having been duly served with the order of restitution,⁴⁴ has failed to comply therewith, the Court may grant a decree of divorce.⁴⁵

A decree of restitution will not be granted upon motion merely, but can only be obtained by way of action.⁴⁶

It is essential to a decree of divorce on the grounds of malicious desertion that the desertion shall be proved to be wilful.⁴⁷ What amounts to wilful desertion is a question of fact for the Court, and must be gathered from all the circumstances of the case.⁴⁸ Length of absence, although an ingredient in the case, is not essential, the Supreme Court having in one case granted a divorce after an absence of only six days.⁴⁹

Where a husband has been compelled to fly the country on account of crime, or has been banished, this will not amount to malicious desertion on his part, but it will rather be the duty of the wife to follow her husband to his new domicile, and, if she refuses, she will make herself liable to an action of divorce on the grounds of malicious desertion by her.⁵⁰

When once the wilful desertion is proved, the Court

⁴⁴ *Gough v. Gough*, 1 Menzies, 257; *Otto v. Otto*, 3 Buch. 104.

⁴⁵ The same rule has been adopted in practice in the Transvaal (*Truter v. Truter*, Kotze, 34. But see *De Villiers v. De Villiers*, 2 Off. Rep. 259; *Henning v. Henning*, 11 Cape L. J. 55).

⁴⁶ *Van Blerk v. Van Blerk*, 1 Menzies, 255; *De Wet v. De Villiers*, *ibid.* 250; *Mulder v. Mulder*, *ibid.* 251.

⁴⁷ *Gough v. Gough*, 1 Menzies, 257; *Campbell v. Campbell*, *ibid.* 252; *Hill v. Hill*, (1906) T. S. 87; *De Grijs v. De Grijs*, (1906) T. S. 306.

⁴⁸ *Mason v. Mason*, 4 E. D. C. 330; *Juhre v. Juhre*, *ibid.* 257; *Mulder v. Mulder*, 1 Menzies, 251.

⁴⁹ *Mostert v. Mostert*, 2 Searle, 128; *Brown v. Brown*, (1905) T. S. 415.

⁵⁰ Voet, 24 : 2 : 13.

has no discretionary power to refuse a decree of restitution of conjugal rights, even though it be proved that the suit is instituted not with the *bonâ fide* object of obtaining such restitution, but with the ulterior object of obtaining a divorce. The plaintiff will be entitled to his or her decree, unless he or she be proved to have been guilty of some matrimonial offence which would have entitled the defendant to a decree of judicial separation.⁵¹ The plaintiff will, however, at once be disarmed by a compliance with the order of restitution. Thus, where a wife has been guilty of malicious desertion for a length of time, but, upon being served with the order of restitution, expresses her willingness to return to her husband, if the husband thereupon refuses to take her back, she will in her turn be entitled to an action of divorce on the grounds of malicious desertion.⁵²

The plaintiff will even be entitled to a decree where he has in the past been guilty of a matrimonial offence which would have entitled the defendant to a divorce, but which has been wiped out by way of compensation. Thus, where a husband has instituted an action of divorce on the ground of adultery, but had failed because it was proved to the satisfaction of the Court that he was himself living in a state of adultery at the time, and had afterwards put away the woman with whom he had been living and sued his wife for restitution of conjugal rights, the Court held that he was entitled to his decree.⁵³

A subsisting decree of judicial separation *à mensâ et thoro* will be a bar to an action for restitution of

⁵¹ *Hodges v. Hodges*, 2 Buch. 298;
Gibbon v. Gibbon, 2 E. D. C. 280;
Le Roes v. Le Roes, 2 Searle, 13.

⁵² Voet, 24: 2: 11.

⁵³ *Heathershaw v. Heathershaw*, 1 Roscoe, 186.

conjugal rights,⁵⁴ and so will even an extra-judicial separation, until the plaintiff has first succeeded in having the decree of separation annulled and set aside by the Court in an action brought for that purpose.⁵⁵ But, though this is so, the Eastern Districts Court, in the case of *Gibbon v. Gibbon*,⁵⁶ where a notarial deed of separation had been entered into by the spouses, the conditions of which had afterwards been disregarded and the deed treated as a nullity by both parties and not pleaded by the defendant as a defence, granted a decree of restitution.

Where the plaintiff has been guilty of conduct which would entitle the defendant to a decree of judicial separation, this will be a good defence to an action for the restitution of conjugal rights.⁵⁷

It is competent for the plaintiff in an action for divorce on the ground of adultery to join the person with whom the adultery was committed as co-defendant and to sue him in damages,⁵⁸ and this is in fact the proper course to pursue if it is intended to sue for damages,⁵⁹ though it is not absolutely necessary, as a separate action may be brought for that purpose. Indeed, an action of damages may be brought against the adulterer without suing for a divorce, but, although the fact of a husband not suing his wife for divorce is not an absolute bar to his claim for damages against the adulterer, it will raise a presumption of collusion, which will have to be rebutted by satisfactory evidence to the contrary.⁶⁰

⁵⁴ *Alcock v. Alcock*, 1 Menzies, 251.

⁵⁵ *Botha v. Botha*, 1 Menzies, 259.

⁵⁶ *Gibbon v. Gibbon*, 2 E. D. C. 280.

⁵⁷ *Mulder v. Mulder*, 1 Menzies, 251.

⁵⁸ *Biccard v. Biccard & Fryer*, 9 S. C. 473; G. 3: 35: 9.

⁵⁹ *Moley Ngohro v. Candlish Bokwe*, 1 Cape L. J. 103.

⁶⁰ *Biccard v. Biccard & Fryer*, 9 S. C. 476; overruling an *obiter dictum* of De Villiers, C.J., in *Nanto v. Malgass*, 5 S. C. 108. See also *Dantile v. M'Tirara*, 9 S. C. 452.

In estimating the amount of the damages in such a case the Court will consider whether the husband himself, being the plaintiff, was not to blame, his treatment of his wife previously to her adultery being an important element in the question; as also will the ability of the defendant to pay.⁶¹ The general behaviour of the plaintiff will also be taken into consideration, both as regards the amount of damages and the payment of costs.⁶²

An action will also lie at suit of a husband against a third party for harbouring a wife and detaining and keeping her from the plaintiff,⁶³ but in such a case the defendant will not be liable for having given shelter to the wife, if it be shown that he acted without *mala fides*, or if the plaintiff's misconduct justified his wife in leaving him.⁶⁴ The real ground of such an action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behaviour he knows to be proper, or from selfish or criminal motives.⁶⁵

CHAPTER IX.

THE CONSEQUENCES OF THE DISSOLUTION OF MARRIAGE.

WHEN a marriage is dissolved by the death of one of the spouses, the immediate effect is to put an end to all the legal consequences of marriage. Community of property and of profit and loss, where these have obtained between the parties, at once come to an end,¹

⁶¹ *Biccard v. Biccard & Fryer*,
9 S. C. 473.

⁶² *Olivier v. Olivier & Peckover*,
1 Cape Times 51.

⁶³ *Le Roex v. Van Wyk*, 1 Menzies,
253.

⁶⁴ *Abner Major v. John Maketta*,
1 E. D. C. 47.

⁶⁵ *Philp v. Squire*, 1 Peake, 114.

¹ Voet, 23: 2: 90; 24: 3: 28;
G. 3: 21: 11; R. Obs., part 1, obs.
88; V. L., vol. 2, p. 192.

and the marital authority ceases, the surviving husband not being entitled to deal with his deceased wife's share of the joint estate or with her separate estate.²

By the customs of some parts of the Netherlands the community of property which subsisted between the spouses was continued between the survivor and the heirs of the first dying,³ but no such custom has ever been recognized in this Colony.⁴ The only way in which such continuance of the community can take effect is where it has been expressly provided for by antenuptial contract, or by the last will of the first-dying spouse,⁵ in which case the survivor is spoken of as the *boedelhouder* (estate-holder).⁶

The joint estate will, however, in any case remain under the charge of the survivor until the executors of the deceased spouse, or the tutor testamentary or dative of the minor children of the marriage, or the Master of the Supreme Court, or *curator bonis* lawfully appointed to such minor children, shall have instituted proceedings for the administration and distribution of the joint estate under the provisions of Ordinances 104 and 105 of 1833.⁷

The survivor, unless appointed sole heir and sole executor of the first-dying,⁸ is bound, under certain penalties,⁹ to have an inventory made of the joint estate within six weeks and transmitted to the Master

² *Van Rooyen v. Gorman*, 6 S. C. 55; *Haupt v. Van den Heever's Executors*, *ibid.* 49.

³ Voet, 24: 3: 28-35.

⁴ *Kotze v. Kotze's Trustees*, 2 Menzies, 414.

⁵ *Cloete v. Cloete's Trustees*, 5 S. C. 59; *Brown v. Rickard*, 2 S. C. 314.

⁶ Ord. 104, 1833, sec. 18. The law of the Colony with respect to *boedelhouderschap* has not been altered by Ordinances 104 and 105,

but is the same as it was before the enactment of those statutes (Ord. 104, secs. 37, 41; Ord. 105, sec. 23), and can be found laid down in the authorities enumerated in Voet, 24: 3: 36.

⁷ Ord. 104, 1833, sec. 13.

⁸ Act 27, 1895, sec. 3.

⁹ Ord. 104, secs. 15, 17; *Anderson's Assignees v. Anderson's Executors*, 11 S. C. 432.

of the Supreme Court¹⁰ and this duty cannot be dispensed with by the joint will or the will of the first-dying;¹¹ but where the survivor has by such will been appointed sole heir and sole executor of the first-dying, such survivor is not bound to frame or lodge an inventory with the Master.¹²

Where a surviving spouse, who is by law bound to frame an inventory, wilfully fails to do so, and unlawfully remains in possession of the joint estate, he or she will, in the distribution of the estate, forfeit all share in any property which may accrue to the estate, and will in addition have to bear the whole of any damage which may be sustained by the joint estate by the loss or deterioration of any part thereof after the death of the first-dying.¹³

The proper course, in case of the dissolution of marriage by death, is for the executor of the first-dying to liquidate the joint estate in so far as may be necessary for the purpose of paying all the debts due by the joint estate and of the proper division of the estate, and after the debts have been paid the net balance of the joint estate will have to be equally divided between the survivor and the heirs of the first-dying.¹⁴ The survivor thereupon receives possession of one-half of

¹⁰ Ord. 104, secs. 14, 18; Act 11, 1873, sec. 5. When there has been no community of property between the spouses, or where the deceased person was unmarried, the duty of having an inventory made and transmitted to the Master falls upon the survivor, or the child or children of the deceased, or the next-of-kin of the deceased, or the person who at the time of the death or immediately thereafter has chief charge of the house in which the death took place; and such person will also have to take charge of the goods and effects

of the deceased until an executor or some other person is appointed to receive delivery of the same (*Ord.* 104, secs. 16, 17, 18; *Act* 11, 1873, sec. 5). On the subject of inventory, see also *Voet*, 24: 3: 30, 33, 35.

¹¹ *Smith and others v. Executors of Sayers*, Foord, 66.

¹² Ord. 104, sec. 18; Ord. 105, sec. 18; Act 27, 1895, sec. 3.

¹³ Ord. 104, sec. 15; conf. G. 2: 13: 3; V. D. K., Th. 270-272; Schorer, Note 108; R. Obs., part 3, obs. 40.

¹⁴ *Voet*, 24: 3: 21.

the estate as his or her own property, whilst the other half goes to the heirs of the first-dying.¹⁵ Where the property can be divided *in specie*, this may be done, the share awarded to each being taken at a valuation ;¹⁶ but where this cannot be done, or where the parties cannot agree as to the mode of division, the whole of the estate will have to be realized and division made.

Except as above mentioned, the survivor will have no right to deal with the joint estate, or at least with deceased's half-share thereof, except in so far as he or she may have acquired a right to do so by the will of the first-dying.¹⁷ Consequently a bond passed by the survivor, not being the executor of the first-dying, over immovable property belonging to the joint estate, will be set aside by the Court at least as far as regards the half-share belonging to the first-dying,¹⁸ as also will any other dealing with the property of the first-dying, unless the bond was passed for the purpose of raising funds to pay the debts of the joint estate or which have been utilized for the benefit of the same,¹⁹ or unless the property has been disposed of for the benefit of the children of the marriage,²⁰ in which case the Court may ratify the acts of the survivor.

The funeral expenses²¹ of the first-dying will have to be paid out of his or her half-share of the estate, and are not a debt due by the joint estate.²² But the

¹⁵ G. 2: 11: 13.

¹⁶ G. 2: 11: 14. As to the guarantee against eviction in the case of a distribution *in specie*, see Voet, 21: 2: 8.

¹⁷ *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 126.

¹⁸ *Molle v. Executors of Van den Berg*, 1 Menzies, 209; *Williams v. Williams*, 12 S. C. 392.

¹⁹ *Van Rooyen v. McColl and others*, 3 S. C. 284.

²⁰ *In re Brown*, 7 S. C. 237.

²¹ As to whether funeral expenses include tombstones, see *Treurnich and another v. De Villiers' Executor*, 21 S. C. 354.

²² Voet, 23: 2: 83; G. 2: 1: 16. As to who is to see to the funeral, see Voet, 11: 7: 7, 8.

medical expenses connected with the last illness of the deceased spouse falls upon the joint estate.²³

All debts contracted and contracts entered into by the husband during the marriage are the liability of the joint estate, and ought by right to be paid and settled by the executor of the first-dying whilst winding up the joint estate. But supposing that, for some reason or other, this has not been done, the question may arise as to the respective liability of the spouses and their heirs. In such a case the husband, who has contracted the debt, and his heirs may be sued *in solidum* for the whole debt, but will have their recourse against the wife and her heirs,²⁴ and if judgment has been obtained against the husband or his heirs for the whole debt, and they are unable to pay, their right of recourse against the wife or her heirs may be attached in execution of the judgment.²⁵

The wife and her heirs may be sued upon the debts and contracts of the husband, but only to the extent of one-half,²⁶ even though at the time of the dissolution of the marriage there were no assets in the joint estate, unless, indeed, the wife, upon the dissolution of the marriage, made a solemn renunciation of all her interest in the joint estate.²⁷

The wife and her heirs may in their turn sue upon contracts entered into by the husband *stante matrimonio* with respect to the joint estate or the separate estate of the wife.²⁸

²³ Voet, 11: 7: 15 *in fine*.

²⁴ *Schultz v. Preller*, 2 Off. Rapp. 208; Voet, 23: 2: 52, 80; G. 2: 11: 17; V. D. K., Th. 225.

²⁵ Voet, 23: 2: 80.

²⁶ *Grassman v. Hoffman*, 3 S. C. 282; *Faure v. Divisional Council of Tulbagh*, 8 S. C. 72; *Sichel v. De*

Wet, 5 E. D. C. 58; *Copeland and Creed v. Ditton*, 9 E. D. C. 123; Voet, 23: 2: 52, 80; G. 2: 11: 17.

²⁷ *Brink v. Louw*, 1 Menzies, 210; Voet, 23: 2: 51; G. 2: 11: 18; V. D. K., Th. 226; Schorer, Notes 97, 98.

²⁸ Voet, 23: 2: 52.

As regards the debts contracted by one of the spouses before marriage, the other spouse, who, as already shown,²⁹ was jointly liable for such debts during the subsistence of the marriage, will, after its dissolution, cease to be liable upon the same to creditors.³⁰ Consequently, where creditors have omitted to sue upon such a debt during the marriage, they can after the dissolution only sue the spouse by whom the debt was actually incurred, who will then have his or her recourse against the other spouse to the extent of one-half.³¹

Where the division of the joint estate between the survivor and the heirs of the first-dying takes place in terms of a mutual will of the spouses, which places a value upon the immovable property of the estate, such valuation will have to be adopted and observed in making the division.³²

Before the actual division is made, the spouses or their heirs may claim from each other collation of all property which by antenuptial contract was stipulated to be brought into the marriage, and has not been so brought in.³³ Collation will also have to be made by the heirs of the first-dying husband, if they be descendants or blood-relations of his, of everything subject to collation³⁴ which they may have received from him during his lifetime out of the joint estate, and this duty cannot be dispensed with by the first-dying to the prejudice of the survivor.³⁵

Where there has been only community of profit and loss, and not of property also, between the spouses,

²⁹ 17 Cape L. J. 120.

³⁰ *Reis v. Executors of Gilloway*, 1 Menzies, 198; G. 2: 11: 15; V. D. K., Th. 224.

³¹ Voet, 23: 2: 80; Schorer, Note 95.

³² *Naudé v. Naudé's Executors*,

10 S. C. 145. See also *Beneke v. Van der Vijver*, 22 S. C. 529.

³³ G. 2: 11: 14; V. D. K., Th. 256.

³⁴ As to what benefits are subject to collation, see Chapter xix.

³⁵ Ordinance, April 1, 1580, sec. 29.

such community will upon the death of one of the spouses come to an end,³⁶ and each spouse will in that case be entitled to claim back whatever has been brought into the marriage by him or her.³⁷ Any profits and acquests which have been made during the marriage, and which fall under the community subsisting between the spouses, will have to be divided into two equal parts, one-half going to the survivor, and the other half to the heirs of the first-dying. If amongst such acquests there is any property which is not capable of division, such property will have to be assigned to the claimant who offers the highest price, or otherwise the property will have to be sold by public auction and the proceeds divided.³⁸

If one of the spouses has contributed less to the support of the marriage than was stipulated in the antenuptial contract, that circumstance will have to be taken into account in the division of the profits.³⁹

Where the community of property and of profit and loss have both been excluded, each spouse will at the dissolution of the marriage receive back his or her own property,⁴⁰ and if anything in the nature of the *dos* of the Roman law has been given to the husband by the wife or some third party for the purpose of defraying the burdens of the marriage, such *dos* will at the dissolution of the marriage have to devolve not according to the technicalities of the Roman law,⁴¹ but in terms of the provisions of the antenuptial contract or other deed under which it was given.⁴²

Where the husband has had the management of any property belonging to the wife, and has been

³⁶ Voet, 23 : 2 : 28.

³⁷ Voet, 23 : 2 : 23.

³⁸ Voet, 24 : 3 : 16.

³⁹ Voet, 23 : 3 : 16.

⁴⁰ Voet, 24 : 3 : 9.

⁴¹ Voet, 23 : 4 : 52 ; 23 : 3 : 1 ; 24 : 3 : 9.

⁴² Voet, 23 : 3 : 9.

guilty of fraud or negligence in such management, or has alienated the wife's property without authority, compensation will have to be made according to the rules laid down above.⁴³ On the other hand, he may be entitled to compensation for loss incurred with respect to the wife's property and expenditure incurred by him in connection with the same.⁴⁴ On this point the following rules will apply :—

Necessary expenses of a heavy nature incurred for the permanent and not merely transitory benefit of the land belonging to one of the spouses will fall upon the spouse to whom such land belongs, whether such benefit still continues in existence at the dissolution of the marriage, to the full extent of the expenditure incurred, or to any extent at all or not.⁴⁵

As regards useful expenses, that is, expenses whereby a thing is improved but which were not necessary for its preservation, these will be allowed for in so far as the property upon which they have been expended shall then be found to have been improved thereby.⁴⁶

Luxurious expenses, namely, such as are meant for ornament merely and do not tend to increase the productiveness of the property, will only have to be made good in so far as the property has been increased in value thereby.⁴⁷

Where the husband has during the marriage and in the exercise of his marital authority effected a lease of his wife's property, such lease will continue valid after the dissolution of the marriage, whether brought about by death or divorce.⁴⁸

⁴³ See p. 64, above. See also Voet, 24 : 3 : 12, 14, 20, 24.

⁴⁴ G. 2 : 12 : 15 ; V. D. K., Th. 259.

⁴⁵ Voet, 25 : 1 : 2.

⁴⁶ Voet, 25 : 1 : 3, 5.

⁴⁷ Voet, 25 : 1 : 4 ; Schorer, Note

106.

⁴⁸ Voet, 19 : 2 : 17 ; 24 : 3 : 22.

The special provisions of the antenuptial contract with respect to marriage settlements or otherwise will, of course, have to be carried out, and the benefits stipulated for by each spouse assigned to the survivor or the heirs of the first-dying respectively.⁴⁹

The effect of a divorce as regards the personal relations of the spouses is to annul the marriage absolutely, and to place the spouses in the same position as if they had never been married at all. Consequently, if the spouses should become reconciled and wish to live together again as man and wife, a fresh marriage will have to be entered into, just as if there had been no previous marriage;⁵⁰ but, if such a marriage does take place, Voet lays it down⁵¹ that the antenuptial contract entered into at the time of the first marriage will be tacitly revived at least as regards the parties themselves, though not as regards others who were parties to such first contract.⁵²

Where there has been carnal intercourse under such circumstances without going through the formalities of a second marriage, any offspring resulting from such connection will be illegitimate by birth.⁵³

Either spouse in case of divorce is at liberty to marry again, but the guilty spouse, as pointed out above,⁵⁴ will be prohibited from marrying the person with whom the adultery was committed.⁵⁵

As regards the property of the spouses, the effect of a decree of divorce would, in the absence of any special order on the subject by the Court granting the divorce, be the same as that of a dissolution of marriage

⁴⁹ Voet, 24 : 3 : 23 ; G. 2 : 12 : 16 ;
V. D. K., Th. 258-261 ; R. Obs.,
part 3, obs. 38.

⁵⁰ Voet, 24 : 2 : 14 ; V. L., vol. 1,
p. 117.

⁵¹ Voet, 24 : 2 : 14 ; 23 : 4 : 5.

⁵² Voet, 23 : 4 : 5.

⁵³ Voet, 24 : 2 : 14.

⁵⁴ See p. 18, above.

⁵⁵ Voet, 24 : 2 : 8, 9 ; V. D. L. 90,
91 ; Schorer, Note 16.

by the death of one of the spouses, the dissolution dating from the date of the granting of the decree.⁵⁶ It follows that all debts incurred up to that date fall upon the joint estate, and, consequently, it has been held that even the defendant's costs of the action of divorce, if he or she has no other means of paying the same, will have to be paid out of the joint estate.⁵⁷

A special order is, however, usually asked for and granted, regulating the rights of the parties with respect to the property. And it would appear that, if in a case of divorce it is desired to have the property dealt with specifically, it will have to be prayed for in the declaration, and where this has not been done, and a divorce is granted without an order as to the property, a separate action will subsequently have to be brought for the purpose, as no order will be granted merely on motion.⁵⁸

Where the parties cannot agree as to the mode of division, the Court may appoint curators or liquidators to divide the property.⁵⁹

When a divorce is granted on the grounds of adultery, the plaintiff may claim a forfeiture by the defendant of all the benefits already derived or still to be derived from the marriage by the latter, whether such benefits proceed from the common law or from the provisions of an antenuptial contract entered into between the spouses.⁶⁰ The consequence of such a forfeiture in a case of community will be that the defendant will be entitled to only so much of his or

⁵⁶ G. 3: 21: 11.

⁵⁷ *Hablutzel v. Hablutzet*, 1 Menzies, 276.

⁵⁸ *Potter v. Potter*, 8 E. D. C. 103.

⁵⁹ *Gillingham v. Gillingham*, (1904) T. S. 609.

⁶⁰ *Wessels v. Wessels*, 12 S. C. 470;

Higgins v. Higgins, 5 E. D. C. 344; *Mandlestein v. Mandlestein*, 4 Cape L. J. 284; *Gericke v. Gericke*, 14 E. D. C. 113; Pol. Ord., April 1, 1580, art. 18; Voet, 24: 2: 23; Lybrecht, Red. Ver., vol. 1, ch. 12, sec. 5,

her half-share of the joint estate as he or she brought into the community, if it be less than the half.⁶¹

The decree of forfeiture must be prayed for and obtained in the action for the divorce, for when the divorce has once been granted and a division of the joint estate decreed, the plaintiff cannot afterwards sue for a forfeiture.⁶²

A prayer for forfeiture will be refused where the defendant has also been guilty of misconduct.⁶³

The same rule as to forfeiture of benefits applies to the case of divorce on the grounds of malicious desertion as of adultery, and besides this the offending spouse will be bound to restore all gifts received from the innocent spouse before the marriage or during the subsistence of the marriage, and the right to recover all these is transmitted to the heirs of the innocent spouse.⁶⁴

Another important consequence of divorce, as well as of judicial separation, has reference to the duties of the spouses as regards the children of the marriage.

As a general rule, the husband is, during the subsistence of the marriage, the natural guardian of the children born of the marriage, and, in the absence of any special reason to the contrary,⁶⁵ he is entitled to

⁶¹ *Dieperink v. Dieperink*, 7 Buch. 92. Under the Roman law this forfeiture extended even to some portion of the offending spouse's own property, such as the *dos* or *donatio propter nuptias* or some fractional portion of the offending spouse's property, and the same law obtained at one time in the United Provinces (*Dawson v. Dawson*, 9 S. C. 446; Voet, 24 : 3 : 19; 48 : 5 : 11; V. L., C. F., part 1 : 1 : 15 : 9; Sententie van den Hove en Hoogen Raad, decis. 8, quoted by Lybrecht in his *Redeneerend Vertoog*, vol. 1, ch. 12, sec. 5; Van der Berg, *Advysboek*, vol. 1, cons. 118; Novel, 117 : 9 : 4, 5; 117 : 10), and has

been enforced by the Transvaal Courts in one or two cases (*Mulder v. Mulder*, 2 S. Af. Rep. 238; *Du Toit v. Du Toit*, 1 Off. Rep. 163), but by the Courts of this Colony the forfeiture has always been restricted to benefits derived from the marriage (*Dawson v. Dawson*, 9 S. C. 446; *Hasler v. Hasler*, 13 S. C. 385; *Celiers v. Celiers*, (1904) T. S. 926).

⁶² *Nortje v. Nortje*, 6 S. C. 9.

⁶³ *Eksteen v. Eksteen*, 9 S. C. 100.

⁶⁴ *Dawson v. Dawson*, 9 S. C. 446; Voet, 24 : 2 : 9.

⁶⁵ *Neethling v. Shock and others*, 2 Buch. 312.

the custody and control of the persons of such children whilst they are under age, and this right he will continue to enjoy after the dissolution of the marriage by death, in case he happens to be the survivor.⁶⁶

The wife's right of control over the person of the children is inferior and subordinate to that of the husband, but still she has similar rights to those of the husband, and consequently where a governess under the instructions of the father, but against the wish of the mother, was removing two sons of twelve and fourteen years of age to England, to be educated there, the Court held that the proper place for such children was at home with the mother, and ordered the governess forthwith to restore them to the mother.⁶⁷ The mother's control will also become complete upon the death of the husband, unless the latter by last will has made special arrangements in that respect by the appointment of testamentary guardians or otherwise. In the absence of any such testamentary disposition on the part of the husband, the wife will be entitled to the custody and control of the children and to the direction of their education as fully as the husband was in his lifetime, unless there are special reasons to the contrary justifying the interference of the Court.⁶⁸

Where a marriage is annulled *ab initio* on the ground of bigamy or for any other cause, the children born of such marriage are illegitimate by birth, and, in accordance with the general rule as to illegitimate children, will fall under the custody of the mother.⁶⁹

In the case of divorce, a special order is generally made by the Court with reference to the custody of

⁶⁶ See Chapter xl., n. 5, below.
See also Voet, 43 : 30.

⁶⁷ *Ex parte Jensen*, 18 S. C. 154.

⁶⁸ Chapter xl., n. 10, below.

⁶⁹ *Hatch v. Hatch*, 9 S. C. 1.

the children, in which respect the Court has the widest and most general discretion.⁷⁰ It cannot be laid down as a general rule that the plaintiff, in an action for divorce or judicial separation, is entitled to the custody of the children,⁷¹ but, in the absence of strong moral reasons to the contrary, the tendency of the Courts is to give the custody of the boys, if not very young, to the father, and that of the girls to the mother,⁷² who will also be allowed the custody of the boys until they have attained the age of seven years or some other suitable age.⁷³ In any case, each spouse will be allowed convenient access to the children who are in the custody of the other spouse.⁷⁴

It is the duty of the Court, in deciding as to the custody of the children, to consider what will be the best for them under all the circumstances of the case, and, considering their interests both from a material and from a moral point of view, to weigh carefully the advantages or disadvantages of giving the custody of all or of any of them to the one parent or the other.⁷⁵

An order is generally made by the Court as to the maintenance of the minor children after the dissolution of the marriage, the husband, as wage-earner, being compelled to contribute to such maintenance,⁷⁶ though it may be laid down as a general rule that both the

⁷⁰ *Simey v. Simey*, 1 S. C. 175; Voet, 25: 3: 20; C. 5: 24; Sande, Decis. Fris., lib. 2, tit. 8, defin. 1.

⁷¹ *Simey v. Simey*, 1 S. C. 175.

⁷² *Painter v. Painter*, 2 E. D. C. 147.

⁷³ *Simey v. Simey*, 3 S. C. 1; *Farmer v. Farmer*, 1 Menzies, 278; *Goldsworthy v. Goldsworthy*, 10 S. C. 139; *Painter v. Painter*, 2 E. D. C. 147; *Cross v. Cross*, 7 E. D. C. 174; V. L., vol. 1, p. 123.

⁷⁴ As to what amounts to reasonable access, see *Mitchell v. Mitchell*,

(1904) T. S. 128.

⁷⁵ *Simey v. Simey*, 1 S. C. 175; *Leyland v. Chetwynd*, 18 S. C. 239; *Bailey v. Bailey*, Hertzog, p. 44; *Alexander v. Alexander*, Hertzog, p. 183.

⁷⁶ Where the wife has been granted the custody of the children and a certain sum for their maintenance, she will not be entitled to such maintenance if she removes the children out of the jurisdiction of the Court.

spouses are, after the divorce, liable to contribute to the same in proportion to their means, the mode or style of maintenance being left to the discretion of the Court.⁷⁷

The successful plaintiff in an action for divorce will, also, if in want, be entitled to claim maintenance for him or herself from the defendant who is in a position to supply the same. But the guilty spouse can in no case claim maintenance from the innocent spouse.⁷⁸

In actions for judicial separation or divorce, an application is frequently made by the wife, whether plaintiff or defendant, for an order upon the husband to compel him to advance her a sufficient sum of money to enable her to proceed with her action or to conduct her defence, and, upon sufficient grounds being shown, the order will be granted whenever there has been community of property between the spouses. Whether the wife will be entitled to such advance where there has been no community is not so clear;⁷⁹ but in the case of *Botha v. Botha* an advance was granted where there was no community.⁸⁰ Where the wife is the plaintiff, a *primâ facie* case will, of course, have to be made out by her before such order will be granted,⁸¹ and in one case the application was refused where the wife had previously entered into an extra-judicial deed of separation with her husband, whereby she agreed, in consideration of the payment of a certain sum of money to her, to give up all claim on her husband's estate in future.⁸² Where the wife is the defendant, it will be sufficient for her to state that she intends to defend the action,

⁷⁷ Voet, 25: 3: 4, 6, 13; V. L. vol. 1, p. 123.

⁷⁸ Voet, 25: 3: 8.

⁷⁹ *Eaton v. Eaton*, 5 E. D. C. 236; *Harper v. Harper*, 4 Cape L. J. 131; *Levy v. Levy*, 18 E. D. C. 113.

⁸⁰ *Botha v. Botha*, 21 S. C. 543. See also *Henning v. Henning*, Hertzog, p. 48.

⁸¹ *Jacobus v. Jacobus*, 15 S. C. 98; *Stage v. Stage*, 2 S. C. 229.

⁸² *Scholtz v. Felmore*, 4 S. C. 192.

without it being necessary for her to state that she has a good ground of defence.^{82a}

In estimating what would be a reasonable amount to allow as such costs, the Court will sometimes refer the matter to the Registrar of the Court for report.⁸³

The wife will also be entitled to maintenance *pendente lite*, unless there are any good reasons to the contrary.⁸⁴

CHAPTER X.

SUCCESSION IN GENERAL.

UNDER the Roman law the whole of the estate of a deceased person, including both assets and liabilities, passed to his heir,¹ who had to administer the estate, and by accepting or, as it was called, adiating the inheritance made himself responsible, subject to the benefit of inventory, for the payment of the debts of the deceased, and also of any legacies which may have been bequeathed by him by will.² This system in its main features was adopted in the United Provinces of the Netherlands, and became the common law of this Colony, but has been swept away by our Statute Law. At the present day the administration of the estate of a deceased person devolves no longer upon his heir, but is vested in statutory executors,³ whose duty it is to liquidate the estates under their care, to pay the debts of the deceased and the legacies left by him, and to hand over the net balance of the estate to the heir, who is only liable for the payment of such legacies as

^{82a} *Robinson v. Robinson*, 19 E. D. C. 183.

⁸³ *Flannagan v. Flannagan*, 1 E. D. C. 42.

⁸⁴ *Bloem v. Bloem*, 2 Buch. 68.

¹ Voet, 29 : 2 : 18.

² Voet, 29 : 2 : 19.

³ *Oosthuysen v. Oosthuysen*, 1 Buch. 63; *Fischer v. Liquidators of Union Bank*, 8 S. C. 46.

may have been specially imposed upon him by the deceased person by will.

The right of succession is the right of sharing, whether as heir or legatee, in the estate of a deceased person after the debts have been paid. Succession is either testate or intestate, or, as it is more usually put in our text-books, it is either testamentary succession or succession *ab intestato*.⁴ The latter takes place only by way of inheritance; the former either by way of inheritance or legacy.

An inheritance is the net balance of the estate of a deceased person which is left after the debts and legacies have been paid, and which has to be handed over by the executor to the heir. The heir therefore is merely a residuary legatee,⁵ and is in no worse position as regards the debts of the deceased testator than any other legatee, with this exception, that he will before all other legatees be liable, at suit of the executor, to a *condictio indebiti* or action for a refund of any moneys paid to him in settlement of his inheritance before the debts of the testator were fully paid, and also to a direct action for such refund at suit of the creditors of the deceased;⁶ but beyond what he has actually received out of the estate he will not be liable.⁷

Testate or testamentary succession is that which takes place under and by virtue of the last will of a deceased person; intestate succession or succession *ab intestato* takes place by force of law when there is no will.⁸

⁴ Succession may also be regulated by antenuptial contract (R. Obs., part 2, obs. 36).

⁵ *Oosthuysen v. Oosthuysen*, 1 Buch. 61.

⁶ *Liquidators of the Paarl Bank v. Roux and others*, 8 S. C. 205.

⁷ *Oosthuysen v. Oosthuysen*, 1 Buch. 62-63; *Fischer v. Liquidators of Union Bank*, 8 S. C. 46; *Liquidators of Union Bank v. Watson's Executors*, 8 S. C. 300.

⁸ Voet, 28 : 1 : 1.

Under the Roman law these two modes of succession were mutually exclusive, and could not both exist concurrently, the rule being that a person could not die partly testate and partly intestate;⁹ but this rule has never been recognized by our law,¹⁰ and consequently a person may at the present day die testate as to part of his estate and intestate as to the rest.¹¹

The first requisite to the right of succession is competency, on the part of the person claiming it, to succeed to the deceased person, whose succession is in question;¹² and it may be stated generally that all persons who are not expressly declared incompetent by law are competent to succeed,¹³ even including persons not yet born.¹⁴

By Act 22, 1876, sec. 3, it is provided that no witness to a will or other testamentary writing can take anything under such will, nor can the wife or husband of such witness, nor any person claiming through such witness or such wife or husband. The following also, according to the text writers, are incompetent to succeed:—

(1) Children born *ex prohibito concubitu* cannot succeed *ab intestato* to either of their parents nor to any relations of their parents, and even under the will of their parents they cannot take more than is sufficient for their maintenance.¹⁵

(2) Persons who have contracted an incestuous

⁹ D. 50: 17: 7; *Dantu v. Widow Hart's Executors*, 1 Buch. 176.

¹⁰ Voet, 28: 1: 1; 28: 5: 26; 29: 2: 26, 40; G. 2: 18: 19; V. D. K., Th. 309.

¹¹ Voet, 29: 2: 40.

¹² Voet, 38: 17, Summary, sec. 2; and Voet, 28: 5: 1.

¹³ Voet, 28: 5: 2, 3, 4; V. D. L. 130.

¹⁴ G. 2: 16: 2; Schorer, Note 115.

¹⁵ Voet, 25: 5: 5; 28: 2: 14 and 38: 17, Summary, secs. 9, 14, 19, 21, 27; G. 2: 16: 6; 2: 27: 28; 2: 31: 6; Schorer, Notes 118, 187, 205; R. Obs., part 2, obs. 41; V. D. L., 130; V. L., vol. 1, pp. 48, 337.

marriage or who have committed adultery cannot inherit from each other.¹⁶

(3) A person who has married a minor without the consent of his or her parents, cannot take anything under the will of the spouse so married.¹⁷

(4) The guardian of a minor, and the wife and children of such guardian, cannot take any property, whether movable or immovable, under the will of such minor.¹⁸ This prohibition, however, does not extend to the curators appointed to minors for some particular purpose,¹⁹ and it ceases upon the termination of the guardianship.²⁰

A similar prohibition applies also to the concubines and sponsors of minors.²¹

(5) The person who wrote the will by which anything is left to him, even if he did so at the request of the testator, cannot take under the will; and this rule applies even to the case of a husband who wrote the mutual will of his wife and himself, by which they confer reciprocal benefits upon each other.²²

(6) The notary before whom a will is executed cannot take under it.²³

(7) Any person who has caused the death of the testator, either wilfully or through negligence, is incompetent to take from such person either as heir, legatee, or donee *mortis causa*.²⁴ So also is one who

¹⁶ Voet, 24: 9: 3.

¹⁷ Voet, 28: 5: 7; 23: 2: 11, 16
et seq.; G. 2: 5: 8; 2: 12: 7; 2:
16: 5; V. L., vol. 1, p. 341.

¹⁸ Voet, 28: 5: 8, 9, 10; 34: 9: 3;
G. 2: 16: 4; V. D. K., Th. 285, 286;
Schorer, Note 117; V. D. L. 130;
V. L., vol. 1, p. 338.

¹⁹ Voet, 28: 5: 10.

²⁰ Voet, 28: 5: 11.

²¹ Voet, 28: 5: 8; G. 2: 16: 4.

²² Voet, 34: 8: 3, 4; V. L., vol. 1,
p. 319. The case of *Van Reenen v.*

Brink's Trustees (5 Searle, 281) is
an authority to the contrary, but it
would seem to have been decided
upon first principles and without any
reference to authorities.

²³ Voet, 34: 8: 3; V. L., C. F.,
part 1: 3: 4: 43; Van Zurck, *Codex*
Batavus, title "Notarissen," sec. 22;
V. L., vol. 1, p. 341.

²⁴ Voet, 34: 9: 6; G. 2: 24: 24;
2: 28: 42; Schorer, Notes 176, 197;
V. L., vol. 1, p. 337.

has wilfully neglected to discover the person who was the cause of it.²⁵

(8) Any person who has since the date of any disposition in his favour lived on terms of mortal enmity with the testator,²⁶ or has laid a criminal charge against him which placed him in peril,²⁷ or has had criminal intercourse with his wife or slandered his memory.²⁸

(9) Any one who has vexatiously disputed the testator's will,²⁹ or has fraudulently concealed a will containing a disposition in his favour,³⁰ or has interfered with the testator's right to make a will, either by preventing him from making one or compelling him to make one.³¹

(10) A widow who marries a second time before the expiration of the year of mourning cannot take under her deceased husband's will, either by way of inheritance or legacy.³²

With respect to the capacity to take under a will, it must be observed that it is essential that it should exist both at the date of the execution of the will and at that of the testator's death, and, in case there is a suspensive condition attaching to an institution or bequest, it must exist also at the date of the fulfilment of the condition ;³³ but incapacity at any intervening period will not prejudice a disposition.³⁴

It may be added that by the *lex hac edictali*, which was formerly in force in this Colony, a testator was not allowed to leave more to a second spouse than to

²⁵ Voet, 34 : 9 : 3 ; G. 2 : 24 : 24.

²⁶ Voet, 34 : 9 : 2, 6, 7, 8 ; G. 2 : 24 : 24.

²⁷ Voet, 34 : 9 : 3, 4.

²⁸ G. 2 : 24 : 24.

²⁹ Voet, 34 : 9 : 3 ; G. 2 : 24 : 24.

³⁰ Voet, 34 : 9 : 2.

³¹ Voet, 34 : 9 : 3.

³² Voet, 34 : 9 : 2.

³³ Voet, 28 : 3 : 12 ; 28 : 5 : 21.

³⁴ Voet, 28 : 5 : 22.

that one amongst the children of a former marriage to whom he had left least.³⁵ But this law has been repealed by Act 26 of 1873.

CHAPTER XI.

SUCCESSION "AB INTESTATO."

THE law of succession *ab intestato* in this Colony is regulated by an Ordinance of the States of the Province of Holland dated April 1, 1580, an interpretation of the said Ordinance promulgated on May 13, 1594, and a Privilege granted by the States-General of the United Provinces to the Dutch East-India Company on Jan. 10, 1661, a translation of the material parts of which will be found in the Appendix.¹

Succession *ab intestato* takes effect whenever there is no testamentary heir, and consequently it takes place either (1) when the testator has left no valid will,² or (2) when there is a failure of the heir instituted under the will, or (3) when the testator has failed to dispose of some portion of his estate.

The right of succession *ab intestato* is based upon consanguinity or blood relationship,³ and such relationship must as a general rule have its origin in lawful wedlock.⁴

³⁵ C. 5: 9: 6; G. 2: 12: 6; 2: 16: 7; V. D. K., Th. 288; Schorer, Note 101; V. D. L. 131; V. L., vol. 1, p. 341.

¹ *Raubenheimer v. Executors of Van Breda*, Foord's Reports, p. 114; 3 Cape L. J., p. 25; *Spies v. Spies*, 2 Menzies, 455. For the translation

of the statutes quoted, see Appendix III., IV., and V. to this Book.

² Voet, 38: 17, Summary, sec. 1.

³ Adoption is not recognized by the laws of this Colony (*Robb v. Mealey's Executor*, 16 S. C. 133).

⁴ Voet, 38: 17, Summary, sec. 7.

Illegitimate children, whether they be *natural*, *i.e.* born in concubinage, or *spurious*, *i.e.* the fruit of promiscuous intercourse, stand in the same position with respect to their mother and her relations as do her legitimate children; consequently they and their descendants succeed to their mother and her relations equally with her legitimate children,⁶ and *vice versâ*.⁶ But as regards their father and his relations, they have no rights of succession whatever,⁷ nor *vice versâ*.⁸

As to legitimated children, that is, such as have been legitimated by the subsequent marriage of their parents,⁹ they are in exactly the same position as if they had originally been legitimate by birth; and therefore they succeed to both father and mother and to their relations equally with those who are legitimate by birth.¹⁰ The right of succession must exist at the date of the death of the deceased person whose estate is in question.¹¹

Not every one, however, who is at the time of the death of the deceased qualified to succeed by virtue of blood relationship, is actually entitled to succeed. A certain order of priority of succession has been laid down by the law, which is regulated not only by the closeness of the relationship as a matter of degree, but also by its kind; that is, whether *descendant*, *ascendant*,

⁶ Voet, 38: 17, Summary, secs. 8, 19, 21; *Magamat Jassiem and others v. The Master and another*, 8 S. C. 259; *In re Russo*, 13 S. C. 185; G. 2: 27: 28; Schorer, Notes 185, 187; V. D. L. 165; V. L., vol. 1, p. 425.

⁶ Voet, 38: 17, Summary, sec. 14.

⁷ Voet, 38: 17, Summary, secs. 8, 19, 21; G. 2: 27: 28; 2: 31: 4; Schorer, Note 186.

⁸ Voet, 38: 17, Summary, sec. 14.

⁹ Legitimation by rescript of the Sovereign having become obsolete, it is unnecessary to inquire into the rights of succession of persons who have been legitimated by that means. They will, however, be found in Voet, 38: 17, Summary, secs. 10, 14, 21; and 39: 5: 27; G. 2: 31: 7; 1: 12: 9; V. D. K., Th. 172.

¹⁰ Voet, 38: 17, Summary, secs. 20, 21; G. 1: 12: 9; 2: 31: 7.

¹¹ *Spies v. Spies*, 2 Menzies, 454; Voet, 38: 17, Summary, sec. 6.

or *collateral*, descendants being preferred to ascendants, and ascendants to collaterals descended from them.¹²

When several persons are entitled to succeed concurrently, the succession may take place either (1) *per capita*, or (2) *in lineas*, or (3) *per stirpes*.¹³ The first, or *per capita*, takes place when all succeed in equal shares;¹⁴ the second, or *in lineas*, whenever the estate of a deceased person has to go partly to the relations on the side of the father, and partly to those on the side of the mother of the deceased;¹⁵ the third, or *per stirpes*, when the succession takes place by *representation*, as it is called, which is a legal fiction whereby a person remoter in degree of relationship steps into the place of a parent, who was nearer in degree to the deceased but has died before him, and takes that portion of the inheritance of such deceased person which the pre-deceased parent, if he had survived, would have been entitled to.¹⁶ It is not essential in this last kind of succession that the person claiming by representation through a pre-deceased parent should be heir to such parent, for there is nothing to prevent a grandson, for instance, from repudiating the inheritance of a pre-deceased parent, and yet succeeding by representation to his grandparent.¹⁷ It is essential, however, that the intervening parent shall have pre-deceased the person whose inheritance is in question; for, if he be still alive, but has repudiated the inheritance, representation will not take place. In such a case the inheritance will either go by the *jus accrescendi* to those who would have inherited concurrently with the repudiating

¹² Voet, 38: 17, Summary, secs. 5, 16.

¹³ *Ibid.*, sec. 4.

¹⁴ *Ibid.*

¹⁵ Ord., April 1, 1580, sec. 27

Raubenheimer v. Executor of Van Breda, Foord, 111.

¹⁶ Voet, 38: 17, Summary, sec. 4.

¹⁷ *Ibid.*

heir, or, if there be none such, to his heirs *ab intestato*, succeeding in their own right and not as representing him.¹⁸

This being premised, succession by representation takes place amongst descendants *ad infinitum*.¹⁹ Amongst collaterals it does not extend beyond the fourth degree; that is, beyond the grandchildren of brothers or sisters, or the children of uncles or aunts, both inclusive.²⁰ Of more remote collaterals, those who are most closely related to the deceased in degree succeed *per capita*, to the exclusion of all others who are more remote.²¹

The following is the legal order of succession *ab intestato*, according to our law:—

1. Children and other descendants in the direct line succeed to their parents or other ascendants by representation or *per stirpes ad infinitum*.²²

2. On failure of descendants, the succession is as follows:—

(a) If the father and mother of the deceased are both alive, they divide the estate between them in equal shares.²³

(b) If only one of the parents be alive, the surviving parent succeeds to one-half of the estate, and the brothers and sisters, whether of the full or half-blood, and their children and grandchildren by representation, to the other half; it being well understood that in such a case half-brothers and sisters and their children and grandchildren only succeed if they are related to the deceased through the parent who is

¹⁸ Voet, 38: 17, Summary, sec. 3.

Raubenheimer v. Executors of Van Breda, Foord, 111.

¹⁹ Ord., April 1, 1580, sec. 20.

²¹ Ord., April 1, 1580, sec. 27.

²⁰ Ord., April 1, 1580, sec. 28;

²² *Ibid.*, sec. 20.

Spies v. Spies, 2 Menzies, 454;

²³ *Ibid.*, sec. 21.

dead :²⁴ for if the parent through whom they are so related be alive, he or she takes one-half of the estate, and the other half goes to the full brothers and sisters of the deceased and their children and grandchildren by representation.²⁵ If there be no brothers or sisters, nor children nor grandchildren of such, surviving, the surviving parent takes the whole of the estate, to the exclusion of all other collaterals.²⁶

(c) If both parents be dead, the brothers and sisters, whether of the full or half-blood, and their children and grandchildren by representation, succeed to the whole estate; it being well understood that half-brothers and sisters, and their children and grandchildren by representation, succeed with the half-hand only. In other words, the full brothers and sisters, and their children and grandchildren by representation, first take one-half of the estate, and then the other half is divided between them and the half-brothers and sisters and their children and grandchildren by representation, in equal shares.²⁷

Brothers and sisters by the same mother are entitled to succeed to each other *ab intestato*, although they are illegitimate.²⁸

(d) Upon failure of brothers and sisters and children and grandchildren of the same, the further descendants of brothers and sisters, who are related to the deceased in the fifth or some remoter degree, succeed *per capita* and not *per stirpes*.²⁹

²⁴ Privilege of Jan. 10, 1661 (see Appendix V.); Interpretation, May 13, 1594 (see Appendix IV.). *Nel v. Nel's Executrix*, 12 S. C. 444.

²⁵ *Bresler v. Kotze's Executors*, 2 Menzies, 449.

²⁶ Privilege, Jan. 10, 1661 (Appendix V.); Interpretation, May 13, 1594 (Appendix IV.).

²⁷ Interpretation, May 13, 1594; Ord., April 1, 1580, secs. 22, 23.

²⁸ *Magamat Jassiem and others v. The Master and another*, 8 S. C. 259.

²⁹ Ord., April 1, 1580, sec. 28; Interpretation, May 13, 1594; *Raubenheimer v. Executors of Van Breda*, Foord, 116; Voet, 38 : 17, Summary, secs. 16, 20, 21.

3. On failure of descendants, of parents and of brothers and sisters and their descendants, then, if there be relatives of the deceased both on the father's and on the mother's side surviving, the estate will descend *per lineas*, one-half going to the relations on the father's side, and the other half to those on the mother's side, without regard being had as to whether there are more of them on the one side or the other.³⁰ The succession will in that case be as follows:—

(a) If there be one or more grandparents alive on both the father's and the mother's side, one-half of the estate goes to the paternal and the other to the maternal grandparent or grandparents.³¹

(b) If the grandparents on one side be dead, the uncles and aunts on that side, and their children by representation, take one-half of the estate, and the grandparent or grandparents on the other side the other half,³² to the exclusion of further descendants of uncles and aunts.³³

(c) If the grandparents on both sides be dead, the uncles and aunts of the one side, and their children by representation, take one-half of the estate, and those on the other the other half, to the exclusion of further descendants of uncles and aunts.³⁴

(d) On failure of uncles and aunts and their children on one or both sides, the further descendants of uncles and aunts, who are related to the deceased in the fifth or some more remote degree, succeed to the half share

³⁰ Ord., April 1, 1580, sec. 27; *Raubenheimer v. Executors of Van Breda*, Foord, 111; *In re Stephens*, 16 S. C. 555.

³¹ Ord., April 1, 1580, sec. 27.

³² *Ibid.*, sec. 25; Interpretation, May 13, 1594.

³³ *Raubenheimer v. Executors of Van Breda*, Foord, 111.

³⁴ Ord., April 1, 1580, secs. 24, 29; *Spies v. Spies*, 2 Menzies, 454; *Raubenheimer v. Executors of Van Breda*, Foord, 111; *In re Stephens*, 16 S. C. 555.

devolving on their side, *per capita* and not *per stirpes*.³⁵

4. Upon failure of grandparents and their descendants on one side or both, the property goes to the great-grandparents and their descendants, &c., *per lineas*; and amongst the collaterals who are related to the deceased in the fifth or some more remote degree, *per capita* and not *per stirpes*.³⁶

5. Upon failure of all relations on one side, the whole inheritance goes to the surviving side.³⁷

6. Upon failure of all blood-relations, the vacant inheritance goes to the Crown as unclaimed property,³⁸ the surviving spouse having no right of succession *ab intestato*.³⁹ Such inheritance will, however, only become permanently vested in the Crown, if not claimed within the period of forty years.⁴⁰

CHAPTER XII.

TESTAMENTARY SUCCESSION.

TESTAMENTARY succession is that which takes place under and by virtue of the last will of a deceased person.

A will is a declaration made by any person during his lifetime as to what he wishes to become of his property after his death.¹ It is either a testament or a codicil.²

³⁵ Ord., April 1, 1580, sec. 28.

³⁶ *Ibid.*

³⁷ Voet, 38 : 17, Summary, sec. 27.

³⁸ *Ex parte Leeuw*, 22 S. C. 340; Voet, 38 : 17, Summary, secs. 27-29; G. 2 : 30 : 1; Schorer, Note 200; V. D. K., Th. 364; R. Obs., part 2, obs. 46; V. D. L. 165. But see *obiter dictum* of De Villiers, C.J.,

In re Booysen, Foord, 188.

³⁹ Voet, 38 : 17, Summary, sec. 26; G. 2 : 30 : 2; Schorer, Note 201; V. D. L. 164; Lybrecht, decis. 2, Note 3, sec. 5.

⁴⁰ Ord. 105, 1833, sec. 36; *Ex parte Leeuw*, 22 S. C. 340.

¹ Voet, 28 : 1 : 3; G. 2 : 14 : 4.

² G. 2 : 17 : 2.

A testament is a last will solemnly executed in accordance with certain formalities prescribed by law. It could in former days be made either in writing or orally, being in the latter case called a *nuncupative* will;³ but at the present day all wills, with the exception perhaps of a privileged military testament,⁴ have to be in writing.⁵

A codicil was formerly a less solemn form of will, the main difference between which and a testament was that no institution of heir or disinherison could take place in a codicil.⁶ It was generally annexed to a testament, but could validly exist even without one,⁷ in which latter case its provisions had to be carried out by the heir *ab intestato*.⁸ Before the enactment of Ordinance 15 of 1845, underhand codicils used to be executed with fewer formalities than underhand testaments, though this was not the case with notarial codicils and testaments.⁹ By that Ordinance, however, this distinction was done away with, and at the present day all underhand wills, with the exception of privileged wills, require the same formalities.¹⁰ At the present day, therefore, the law with respect to testaments and codicils, which had already been greatly assimilated under the common law,¹¹ is identically the same. It follows that whatever may validly be done in a testament may now validly be done also in a codicil.¹²

³ Voet, 28: 1: 3; G. 2: 17: 23; *Wilhelmina v. Robertson*, 2 Menzies, 416.

⁴ See p. 129, below.

⁵ Ord. 15, 1845, sec. 3.

⁶ G. 2: 25: 5-8; V. D. L. 127.

⁷ *Van Reenen v. Board of Executors*, 6 Buch. 44; Voet, 29: 7: 1; G. 2: 25: 4.

⁸ *Dwyer v. O'Flinn's Executor*,

3 Searle, 32.

⁹ *Ibid.*, 33; Voet, 29: 7: 5; G. 2: 25: 3.

¹⁰ Ord. 15, 1845, sec. 4. See p. 128, below.

¹¹ Voet, 29: 7: 5; V. L., vol. 1, p. 313.

¹² Voet, 29: 7: 5; *Brink v. Voigt*, 1 Menzies, 537.

CHAPTER XIII.

THE EXECUTION OF WILLS.

THE general requisites of a will are (1) a testator competent to make a will,¹ (2) freedom of will on the part of the testator,² (3) execution of the will according to the forms prescribed by law, and (4) competent witnesses to attest the will.

As a general rule every person is competent to make a will unless he has been declared incompetent by law,³ married women not requiring the consent or assistance of their husbands,⁴ nor minors the authority of their guardians.⁵

The following persons are incompetent to make a will :—

1. Persons under the age of puberty, *i.e.* fourteen years for males and twelve for females,⁶ nor will this incapacity be removed by marriage before the age of puberty,⁷ for such marriage would be void, nor will the authority of the guardian make up for the want of capacity in this respect.⁸ A will made before puberty will not even become valid if, after attaining puberty, the testator adheres to it and expresses his intention of doing so, unless he does so in the form of a will duly executed.⁹

2. Lunatics and persons of unsound mind.¹⁰ If a

¹ *Executors of Cerfonteyn v. O'Haire*, 3 Buch. 129.

² *Ibid.*

³ Voet, 28 : 1 : 31, 38; 29 : 7 : 2.

⁴ Voet, 28 : 1 : 38.

⁵ Voet, 28 : 1 : 43.

⁶ In computing the time of puberty it has been benignantly laid down that the last day of impuberty is to be regarded as completed as soon as it is begun. Consequently, a will

executed on the last day of the fourteenth year will be valid (Voet, 28 : 1 : 31). In case of doubt also the testator must be presumed to have attained the age of puberty, the onus of proof being on the person who denies it (Voet, 28 : 1 : 33).

⁷ Voet, 28 : 1 : 43.

⁸ Voet, 28 : 1 : 31, 32.

⁹ Voet, 28 : 1 : 31.

¹⁰ Voet, 28 : 1 : 34; *Van der Spuy*

lunatic has lucid intervals, he may make his will during such an interval,¹¹ but in that case certain precautionary measures will have to be taken, so as to remove all doubt of his sanity at the time of such execution.¹²

3. Persons in a state of intoxication.¹³

4. Persons suffering from any physical defect or defects which render it impossible for them to express their wishes as to their succession, either by written words or spoken speech.¹⁴

By our common law many persons were incapacitated from being witnesses to a will, but at the present day every one above the age of fourteen years, who is competent to give evidence in a Court of law, is qualified to be a witness to a will.¹⁵ Persons, however, who are afflicted with idiocy, lunacy, or insanity, or who are labouring from any imbecility of mind arising from intoxication or otherwise, being incompetent to give evidence in a Court of law,¹⁶ are equally incompetent to be witnesses to a will.

In addition to these the following were formerly incompetent:—

1. A woman was incompetent to be a witness to a testament but not to a codicil.¹⁷

2. Prodigals who had been declared such by the Court.¹⁸

v. *Maasdorp*, 2 Menzies, 420; *Bekker v. Bekker's Executor*, 2 Menzies, 436. The onus of proving that the testator was at the time of making his will suffering from madness, unsoundness of mind, or intoxication, will be upon the person alleging it (Voet, 28: 1: 35).

¹¹ Voet, 28: 1: 34.

¹² *In re Kemp*, 2 Menzies, 435; Voet, 28: 1: 34.

¹³ Voet, 28: 1: 34; Appendix to

1 Holl. Cons., st. 3, p. 48 in pr.; Schorer, Note 111.

¹⁴ Voet, 28: 1: 36; G. 2: 15: 6; R. Obs., part 2, obs. 38.

¹⁵ Act 22, 1876; Act 16, 1874; Ord. 14, 1846, sec. 2.

¹⁶ Ord. 72, 1830, sec. 3.

¹⁷ *Dwyer v. O'Flinn's Executor*, 3 Searle, 16; Voet, 28: 1: 7, 22; 29: 7: 1, 5.

¹⁸ Voet, 28: 1: 7.

3. Mutes and deaf and blind persons.¹⁹

4. Persons who had been declared incompetent to be witnesses by reason of conviction for certain crimes, and generally all persons who were marked with infamy.²⁰

Others again, though not absolutely incompetent, were incompetent relatively to certain testators. These were :—

5. Persons related to the testator within the fifth degree of consanguinity were incompetent to be witnesses to a notarial will made by him,²¹ but not to an underhand will.²²

6. The heir, whether direct, substituted, or fideicommissary, could not be witness to the will in which he was instituted,²³ and the same was the case with the father, son, and brother of such heir.²⁴

7. A legatee could not be a witness to a notarial will containing the bequest in his favour,²⁵ but he could to an underhand will,²⁶ and apparently to a closed will also.²⁷

The incompetency of an heir or legatee was removed by Act 22, 1876, by the third section of which, however, as already stated, it is provided that the institution or bequest contained in a will to which the beneficiary was a witness is void. And the same is the case with respect to the appointment of an executor, administrator, or guardian.²⁸

Two or more persons may make their wills in one

¹⁹ Voet, 28 : 1 : 7.

²⁰ Voet, 28 : 1 : 7, 22.

²¹ *Van Reenen v. Board of Executors*, 6 Buch. 44.

²² *Executor of Upton v. Upton*, 9 Buch. 289; 2 Roscoe, 42; *Le Sueur v. Le Sueur*, 6 Buch. 153; *Van Niekerk v. Raubenheimer's Executrix*, 7 Buch. 51.

²³ *Joubert v. Executor of Roussouw*, 7 Buch. 21.

²⁴ Voet, 28 : 1 : 9, 22.

²⁵ *Ibid.*, sec. 22.

²⁶ *Ibid.*, secs. 9, 26.

²⁷ *Ibid.*, sec. 26.

²⁸ Act 22, 1876, sec. 4; *In re Watson*, 10 S. C. 276; *Doman and Lewis v. The Master*, 20 S. C. 257.

and the same deed or written instrument, the formalities required for their execution being observed only once. But in such a case the wills of the different parties are regarded as separate and distinct wills,²⁹ and not as one will. Such wills are called joint or mutual wills.³⁰

Wills are either notarial or underhand, *i.e.* non-notarial.

As regards the mode of executing a will, it would appear that a will will be valid if executed in accordance with the *lex domicilii* of the testator, which is at the same time to *lex loci rei sitæ* as regards immovable property disposed of in the will, even though not made in accordance with the law of the place where it is executed (*lex loci actus*).³¹

All written wills were at one time executed before seven witnesses. In the sixteenth century, however, the profession of public notary was introduced into the Netherlands, and a notary was then, by reason of the public and responsible nature of his office, regarded by a legal fiction as having the same weight and authority in the matter of attestation as five ordinary witnesses, and the rule was introduced by custom that a testament might validly be executed before a notary and two witnesses.³²

Underhand wills still continued in use, and were executed before seven witnesses. This state of the law continued in this Colony until Jan. 1, 1844, when a fundamental alteration was made therein by Ordinance

²⁹ *South African Association v. Mostert*, 2 Buch. 262, and 3 Buch. 122; *Oosthuysen v. Oosthuysen*, 1 Buch. 56, 66; V. L., C. F., part 1: 3: 2: 15, 16; 4 Burge, 404; V. D. L. 129; V. L., vol. 1, p. 318.

³⁰ As to mutual wills, see p. 138,

below.

³¹ *Re Eliashof's Estate*, (1903) T. S. 833.

³² *Per* Cloete and Watermeyer, J.J., *In re Sir John Wyldes Will*, 3 Buch. 196; V. L., vol. 1, p. 320.

4 of 1843, which was subsequently repealed and superseded by Ordinance 15 of 1845. This latter Ordinance provides that no will or other testamentary writing made or executed upon or after Jan. 1, 1844, which if made before the said date would in order to be valid have required to be witnessed by seven or some other number of witnesses, shall be valid unless executed in the manner prescribed by that Ordinance.

Wills therefore which could previously to Jan. 1, 1844, be made without the necessity of having any witnesses present at all, such as privileged wills made under and by virtue of a reservatory clause or a holograph will made by a parent in favour of children, are excluded from the operation of that Ordinance.

Notarial wills are not in frequent use at the present day. They are executed before a notary and two witnesses, whether they be testaments or codicils.³³ The proper mode of procedure is for the notary, after having reduced the will to writing by the direction of the testator, to inquire of him in the presence of two witnesses whether it is his will; and an answer in the affirmative having been given, the will is then signed by the testator, the notary, and witnesses.³⁴ Before the promulgation of Act 3 of 1878, a further formality was required, namely, that the will should be read over by the notary to the testator in the presence of the witnesses.³⁵ This requirement has been abolished by that Act, but, if a will has been so read over, it will be valid even though not signed by the testator or the witnesses.³⁶

³³ Voet, 28: 1: 20; 29: 7: 5; G. 2: 25: 3; *Dwyer v. O'Flinn's Executor*, 3 Searle, 33.

³⁴ Voet, 28: 1: 23; *De Smidt v. Hoets*, 1 Searle, 272; V. L., vol. 1, p. 316.

³⁵ *Meiring v. Executors of Meiring*, 8 Buch. 27; 3 Roscoe, 6; *De Smidt v. Hoets*, 1 Searle, 272.

³⁶ *Re Proctor's Will*, 5 S. C. 159; *Robertson v. Executors of Robertson*, 2 Menzies, 416; *Horak's Heirs v.*

To avoid the possibility of impersonation, a notary is not allowed to execute the testament of a person he does not know, unless he knows the witnesses and is assured by them that the testator is the person whom he represents himself to be, and therefore a testament made by a person who was not known either to the notary or the witnesses is null and void.³⁷

The notary is bound to insert the name of the place where the will is executed and the date of execution; the omission to insert the date will render a will void,³⁸ nor will the notary be entitled after some lapse of time to insert the date in his protocol, especially when he has already issued copies of the will without the date to the interested parties, unless, indeed, it is the only testament of the testator in existence, so that there can be no question as to priority or otherwise.³⁹

A will cannot be executed before a notary whose son or father or other near relation is instituted heir therein.⁴⁰

A special form of notarial will is the closed or sealed will; that is, one which, having been written by the testator or by some one else by his instructions and signed and closed by him, is exhibited to the notary and two witnesses, and declared by the testator to contain his will. A declaration to this effect is thereupon written by the notary on the outside or back of the document, after it has been duly sealed by him, which declaration is to be signed by the testator and the notary and witnesses. This declaration is

Widow Horak, 2 Menzies, 402; Voet, 28: 1: 22; V. L., C. F., part 1: 3: 2; V. D. K., Th. 296; V. D. L. 126; V. L., vol. 1, p. 317, and p. 323, n. 8 *in fine*.

³⁷ Voet, 28: 1: 24; 4 Holl. Cons.,

c. 375; 6 Holl. Cons., st. 2, c. 48; G. 2: 17: 22; V. D. L. 125.

³⁸ Voet, 28: 1: 25; 3 Holl. Cons., st. 2, cons. 228.

³⁹ Voet, 28: 1: 25.

⁴⁰ *Ibid.*, secs. 22, 28.

called the Act of Superscription.⁴¹ All the documents found in such a sealed will, upon its being opened, must be taken and read as forming part of the will.⁴²

Of underhand wills there are three classes, namely, ordinary, extraordinary, and privileged.⁴³

The mode of execution of ordinary wills before January 1, 1844, differed from what has obtained since that date.⁴⁴ Before that date ordinary underhand testaments had to be executed in the presence of seven witnesses, who had all to be present at the same time,⁴⁵ and signed by the testator and the witnesses.⁴⁶ If from want of education or from some other cause the testator was unable to write, some other person was required, in addition to the seven witnesses, to sign the will on behalf of the testator.⁴⁷

Since January 1, 1844, an ordinary underhand will is made in presence of two witnesses only. The mode of execution is regulated by Ordinance 15 of 1845, which requires that the will shall be signed at the foot or end thereof by the testator himself, or by some other person in his presence and by his direction.⁴⁸ Where the testator signs by writing his initials or making his mark merely, or authorizes some one else to do so, this will amount to a valid signature, without requiring the presence of an additional witness.⁴⁹ The signature must be either made or

⁴¹ Voet, 28: 1: 26; *Hofmeyer v. De Wet*, 1 Buch. 343; *In re Hoets*, 2 Menzies, 459; V. D. L. 126; V. L., vol. 1, p. 318.

⁴² *Neethling's Curator v. Neethling's Executor*, 1 Buch. 333.

⁴³ Voet, 28: 1: 3.

⁴⁴ Ord. 15, 1845.

⁴⁵ *Macdonald v. Hart*, 3 Searle, 37; V. D. L. 127.

⁴⁶ Voet, 28: 1: 5, 6, 22.

⁴⁷ *Ibid.*, sec. 5.

⁴⁸ Ord. 15, 1845, sec. 2; *In re Van Rooyen*, 1 Roscoe, 59; *In re Trollip*, 12 S. C. 243.

⁴⁹ *Troost v. Ross*, 1 Roscoe, 96, and 4 Searle, 211, and *In re Trollip*, 12 S. C. 243, overruling *Van Vuuren v. Van Vuuren*, 2 Searle, 116, and affirming the judgment of Bell, J., in that case. See also *Re Le Roux*, 3 S. C. 56; *Dama v. Dama*, 18 E. D. C. 70.

acknowledged⁵⁰ by the testator in the presence of two or more competent witnesses present at the same time,⁵¹ and in such a position as to enable the testator and witnesses to see each other.⁵² The witnesses have then to subscribe the will in the presence of the testator, signature by a mark, or by the witness holding the end of the pen whilst another person writes his name, being sufficient,⁵³ and, where the will is written upon more leaves than one, the testator and the witnesses will have to sign their names upon at least one side of every leaf upon which the will is written.⁵⁴

It may be as well to add that the proclamation of Lord Charles Somerset of July 12, 1822, though it reserves to natural-born subjects of the United Kingdom, under certain conditions, the same rights of devising their property as they would be entitled to exercise under the laws and customs of England, does not give them the right to execute their wills according to the law of England, all wills executed in this Colony requiring to be executed according to the laws of the Colony.⁵⁵

⁵⁰ *Dwyer v. O'Flinn's Executor*, 3 Searle, 16; *Roux v. Lombard*, 9 E. D. C. 201; *Blake v. Blake*, 7 P. D. 102.

⁵¹ Ord. 15, 1845, sec. 3; *Laubscher v. Basson's Executor*, 1 Buch. 251; *De Bruyn v. De Bruyn*, 4 Buch. 8; *Macdonald v. Hart*, 3 Searle, 37; *Van der Byl and Haupt v. Scholtz*, 15 S. C. 483; *Van Niekerk v. Van Niekerk*, 15 S. C. 229.

⁵² *Lawson v. Pritchard*, 1 Roscoe, 93.

⁵³ *Re Le Roux*, 3 S. C. 56; *Van Niekerk v. Van Niekerk*, 15 S. C. 229.

⁵⁴ Ord. 15, 1845; *Walker v. Executors of Walker*, 4 Buch. 144; *In re*

Smit, 1 Cape L. J. 116; *Van Reenen v. Board of Executors*, 6 Buch. 44; *In re Ebdens Will*, 4 S. C. 495; *Van Vuuren v. Van Vuuren*, 2 Searle, 116; *Van Wyk v. Van Wyk*, 5 S. C. 1; *The Estate of Mentz*, 4 Cape L. J. 232; *Roche Blanche v. Widow Pass*, 2 Menzies, 453; *In re Walter's Will*, 9 S. C. 311; *In re Lloyd*, 12 S. C. 117; *In re Trollip*, 12 S. C. 243; *Robb v. Mealey's Executor*, 16 S. C. 133.

⁵⁵ *Dwyer v. O'Flinn's Executor*, 3 Searle, 16; *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 127. But see *Davis v. Trustee of Minors Brisley and another*, 18 S. C. 415.

In former times there were several species of extraordinary wills, that is, wills which required to be executed with more than the usual formalities, but how far these are still in use in this Colony is doubtful. Blind persons, for instance, according to some text-writers,⁵⁶ required eight witnesses instead of seven; but it is submitted that, under the terms of Ordinance 15 of 1845, two witnesses are sufficient.⁵⁷

Again, lunatics who had lucid intervals were allowed to make a will during such an interval, but, according to some text-writers, this could only be done in the Netherlands with the leave of a Provincial Court or some other Magistrate having jurisdiction in such matters.⁵⁸ But in *Kemp's Case*⁵⁹ the Supreme Court refused to grant such leave, on the ground that that Court, as the supreme tribunal of the Colony, might afterwards have to adjudicate as to the validity of the will made by its leave, and that the practice in the Netherlands referred only to the Provincial Courts and Magistrates of those Provinces, and not to the High Council or Supreme Court of the Confederation. The Court recommended the parties to have recourse to the Resident Magistrate, or to one or more Justices of the Peace, before whom the will might be executed, and subscribed by as many medical men as witnesses as were prepared to certify to the testator's sanity at the date of such execution.

The same practice, according to the text-writers, prevailed with regard to prodigals who had been placed under curatorship; but it is submitted that

⁵⁶ Voet, 28: 1: 37; V. L., C. F., part 1: 3: 2: 14; V. L., vol. 1, p. 322.

⁵⁷ See by analogy *Troost v. Ross*, 1 Roscoe, 96, and 4 Searle, 211; *Re*

Le Roux, 3 S. C. 56; *Van Vuuren v. Van Vuuren*, 2 Searle, 116.

⁵⁸ Voet, 28: 1: 34.

⁵⁹ *In re Kemp*, 2 Menzies, 435.

the same reasoning would apply to their case as to that of lunatics, and, further, that the wills of prodigals ought to be sustained, provided they are reasonable and not tainted with prodigality.⁶⁰

Privileged wills are such as may be executed with less than the ordinary formalities. The principal of these are :—

(1) A will made under and by virtue of a reservatory clause contained in an earlier testament. The reservatory clause is a clause inserted in a testament, whether notarial or underhand, by which the testator reserves to himself the right of making all such alterations in and additions to such testament as he may think fit, either by a separate deed or at the foot of the testament, and desires that all such alterations and additions shall be equally valid as if inserted in the testament itself.⁶¹ A codicil executed under and by virtue of such a clause requires no witnesses whatever, but is valid if signed by the testator alone, and will be regarded as part and parcel of the testament and of the same effect as if inserted therein, provided it expressly purports to be made and executed under and by virtue of the reservatory clause, and provided its execution by the testator is incontestably proved.⁶²

(2) A *holograph* will, that is, a will made by a parent, grandparent, or other ascendant in favour of his or her children,⁶³ grandchildren, or further

⁶⁰ Voet, 28 : 1 : 34; Appendix to 1 Holl. Cons., st. 3, p. 48 *in fine*; V. D. K., Th. 281; Schorer, Note 112; R. Obs., part 2, obs. 37; V. D. L. 128.

⁶¹ *In re Sir John Wyld's Will*, 3 Buch. 193; Lybrecht, ch. 20, s. 38; Voet, 28 : 1 : 29; 28 : 5 : 15; Schorer, Note 181.

⁶² *In re Sir J. Wyld's Will*, 3 Buch. 193; *Nelson v. Currey*, 4 S. C.

355; *Van de Wall v. Van de Wall's Executors*, 13 S. C. 316; *Erasmus v. Erasmus' Guardians and Executors*, (1903) T. S. 843; *Pullen v. Gilfillan*, Hertzog, p. 206; Lybrecht, ch. 20, s. 38; V. D. K., Th. 337; Ord. 15, 1845, sec. 4; 6 Holl. Cons., Appendix, cons. 5; Voet, 28 : 1 : 29; 28 : 5 : 15.

⁶³ Under the term "children," adopted children are not included,

descendants, and written by the testator himself with his own hand. This form of will also requires no witnesses.⁶⁴ The privilege, however, if the testator is the father, applies to legitimate offspring only; but, if the mother is the testatrix, it applies to illegitimate children also.⁶⁵ Such a will also will hold good only as regards the children or other descendants; and consequently, if the will contains any provision in favour of an outsider, such provision will be void, but the provisions in favour of the children will remain of full effect.⁶⁶

(3) Soldiers while on active service may make a will without any formalities whatever, provided that the will can be established by sufficient legal proof;⁶⁷ thus a letter written by a sergeant-major in the Cape Mounted Rifles, whilst on active service, to a sister of his in which he stated that, if anything should happen to him during the war, he would like to divide his property equally between her and another sister, has been accepted by the Supreme Court as the privileged will of such soldier, he having been subsequently killed in action.⁶⁸ And the same privilege attaches to non-combatants who are attached to an army while on active service in an enemy's country.⁶⁹ Such a will will continue to hold good for one year after the return of the soldier or non-combatant from active service.⁷⁰

adoption not being recognized by the law of this Colony (*Robb v. Mealey's Executor*, 1 S. C. 133).

⁶⁴ Voet, 28 : 1 : 15, 17; 28 : 2 : 1; *Executors of Eaton v. Eaton*, 5 Buch. 173; *Ex parte De Wet*, 5 Buch. 119; *Steer's Executor v. The Master*, 5 S. C. 313; *In re McCalgan*, 10 S. C. 277; *In re Herbert*, 11 S. C. 105 G. 2 : 17 : 28; V. L., vol. 1, p. 324. *Ex parte Huskisson and another*, 21 S. C. 4; *Robb v. The Master*, 3 Cape

Times, 129; *Ex parte Kohrs*, (1905) T. S. 253.

⁶⁵ Voet, 28 : 1 : 16.

⁶⁶ Voet, 28 : 1 : 16; *Steer's Executor v. The Master*, 5 S. C. 313; *Van de Wall v. Van de Wall's Executors*, 13 S. C. 316.

⁶⁷ Voet, 29 : 1 : 1, 2, 3, 11; 28 : 1 : 14, 15; G. 2 : 17 : 29.

⁶⁸ *In re Leedham*, 18 S. C. 450.

⁶⁹ Voet, 29 : 1 : 10.

⁷⁰ Voet, 29 : 1 : 11; G. 2 : 17 : 29.

As regards codicils, they were, when made before a notary, always executed with the same formalities as notarial testaments.⁷¹ Underhand codicils, on the contrary, could formerly be executed in the presence of five witnesses,⁷² when a testament required seven. At the present day underhand codicils require the same formalities as underhand testaments,⁷³ and, if duly executed, will be valid, though purporting to be executed under a reservatory clause contained in a will which does not exist or has been declared invalid.⁷⁴

In this connection it may be well to mention the *codicillary clause*, which, when underhand codicils still required less formalities than underhand testaments, was used for the protection of testaments against the inadvertent omission of some of the formalities essential to their validity as testaments,⁷⁵ and provided that, if the testament could not take effect as a testament, it should take effect as a codicil.⁷⁶ The effect of such a clause was that if a testament turned out to be defective as to formalities, but had been executed with the formalities required for a codicil, or if the institution became void through failure of heirs, it was upheld as a codicil, the direct institution of heir contained in it being converted into a fideicommissary institution, burdening the heirs *ab intestato*⁷⁷ with the legacies left in it.⁷⁸ The insertion of this clause in testaments was so universal in the United Provinces that in course of

⁷¹ Voet, 29: 7: 5; G. 2: 25: 3; Schorer, Note 179.

⁷² *Macdonald v. Hart*, 3 Searle, 37; Voet, 29: 7: 1; G. 2: 25: 2.

⁷³ Ord. 15, 1845; *Dwyer v. O'Flinn's Executor*, 3 Searle, 16; *Macdonald v. Hart*, 3 Searle, 37.

⁷⁴ *Ex parte Executors of Webber*, 19 S. C. 429.

⁷⁵ G. 2: 24: 7.

⁷⁶ *Macdonald v. Hart*, 3 Searle, 37; *Dwyer v. O'Flinn's Executor*, 3 Searle, 16; Voet, 29: 7: 6, 8; 5: 2: 17; V. L., vol. 1, p. 314.

⁷⁷ G. 2: 24: 7.

⁷⁸ Voet, 36: 1: 36; 29: 4: 3, 8; 38: 17: 28; V. L., vol. 1, p. 314.

time it began to be tacitly implied even when not actually inserted.⁷⁹ At the present day the clause is no longer of any use, inasmuch as testaments and codicils are now both executed with exactly the same formalities.

CHAPTER XIV.

THE CUSTODY, OPENING, AND PROBATE OF WILLS.

ANY person who has executed a will, codicil, or other testamentary writing, may lodge the same under a sealed cover with the Master of the Supreme Court, who will be obliged to keep the same unopened till the death of the testator, unless it is sooner demanded back by him.¹

With respect to notarial wills, the notary retains the original or what is called the *minute* in his protocol or register of notarial deeds, and delivers a notarial copy thereof, called the *grosse*, which he certifies to as being a copy of the original which he has filed in his protocol.²

Every person who at the time of the death of any person has in his possession any deed which is or purports to be the last will, codicil, or other testamentary deed of such last-mentioned person, or comes into possession of the same afterwards, and any notary who has the original of any such deed in his protocol, is bound under a penalty of five pounds sterling³ to transmit the same to the Master of the Supreme Court,

⁷⁹ Schorer, Note 167; Voet, 29:7: *Neethling*, 4 Searle, 59; G. 2:17: 7; 29:4:3; 5:2:14; 36:1:6. 23; V. D. K., Th. 297.1

¹ Ord. 104, 1833, sec. 2.

³ Act 27, 1895, sec. 5.

² Lybrecht, ch. 20, sec. 6; *In re*

either directly or indirectly through the Magistrate of the district in which he resides; ⁴ and if he fail to do so, the Master may make a summary application to the Supreme Court or any Judge thereof for an order compelling him to do so. ⁵

All wills lodged in, delivered at, or transmitted to the office of the Master are, after the death of the testator, enregistered in the original in the Register of Wills. ⁶ The *grosse* of a notarial will is not regarded as an original; ⁷ but in case of the loss of the original or *minute*, the Master will be justified, without any further proof, in registering the *grosse*. ⁸ And where the original of an underhand will is lost, the Court will, upon application, order the Master to grant probate upon a copy of the will. ⁹

Where there are irregularities appearing upon the face of a will offered for registration, the Master may refuse to register it, until the parties have proved to the satisfaction of the Court that it was duly executed. The Court may in such a case, after a rule *nisi* has been granted calling upon the necessary parties to show cause why the will should not be enregistered, fix a day for the hearing of witnesses and for making a final order in the matter. ¹⁰

As soon as a will has been enregistered by the Master, it becomes a part of the public archives or records, and cannot afterwards be removed from the same without an order of Court. For the purpose

⁴ Ord. 104, 1833, sec. 3; Act 11, 1873, sec. 5; *In re Heron*, 2 Menzies, 423; *Master v. Berrangé*, 11 S. C. 68. See also Voet, 43 : 5 : 1.

⁵ Ord. 104, 1833, sec. 6; *In re Deney's*, 4 Searle, 60; *In re Neethling*, *ibid.* 59; *In re Proctor*, *ibid.* 61.

⁶ Ord. 104, 1833, sec. 7.

⁷ Lybrecht, ch. 20, sec. 6. But

see the remarks of Cloete, J., in *Stanford v. Brunette and others*, 3 Searle, 111.

⁸ *Master v. Berrangé*, 11 S. C. 68.

⁹ *In re Beresford*, 2 S. C. 303; 4 Searle, 60; *In re McGibbon*, 4 Searle, 61.

¹⁰ *Van Niekerk v. Van Niekerk*, 15 S. C. 229.

of proving the contents of such a will, a copy duly certified by the Master or keeper of the records will be sufficient.¹¹ But when the validity of a will is disputed, and the original is required in Court, the Supreme Court will, upon application, order the Master to transmit the original to the Court in which it is required.¹²

Where a will has got lost or been destroyed without any intention of revocation on the part of the testator, and no copy of it is forthcoming, the only way of establishing the contents of the will will be by parole evidence in an action at law.¹³ Where a copy of the lost will can be satisfactorily proved, the Court may grant a rule *nisi* on motion calling upon all persons interested to show cause why the copy should not be accepted by the Master in place of the original.¹⁴

The opening of a sealed will requires somewhat similar formalities to those of its execution;¹⁵ that is to say, the notary has to make an act of opening, setting forth that the will was opened in the presence of the notary, and what he finds in the enclosure,¹⁶ and if the opening is done by the Master he should do the same.¹⁷

Where a sealed will is opened from motives of curiosity by a person who is benefited thereby, it would appear that he forfeits such benefit.¹⁸

The opening of a will should take place as soon as possible after the death of the testator.¹⁹

¹¹ *Bekker v. Meyring*, 2 Menzies, 438.

¹² *De Klerck v. Jordaan*, 4 Searle, 58; *In re Weston*, *ibid.* 60.

¹³ *Roux v. Lombard*, 9 E. D. C. 201; *In re Beresford*, 2 Juta, 303; Voet, 28: 4: 2.

¹⁴ *In re Templeman's Estate*, 17 S. C. 226; *Re Dumeny*, (1902) T. S. 190.

¹⁵ *Hofmeyer v. De Wet*, 1 Buch. 343; V. L., vol. 1, p. 319, note (c).

¹⁶ *Hofmeyer v. De Wet*, 1 Buch. 334; Voet, 29: 3: 5; G. 2: 17: 26; V. D. L. 127.

¹⁷ *In re Hoets*, 2 Menzies, 459.

¹⁸ 4 Holl. Cons., c. 375; 6 Holl. Cons., st. 2, c. 48.

¹⁹ Voet, 39: 3: 1.

CHAPTER XV.

INVALIDITY OF WILLS.

WILLS may be invalid either *ab initio*, or may become so afterwards from some cause arising after their execution.¹

They are invalid *ab initio* for one or other of the following reasons :—

1. Incapacity on the part of the testator.²
2. Absence of free will on his part at the time of the execution, by reason of undue influence brought to bear upon him.³
3. Incapacity on the part of the witnesses.
4. Omission of the necessary formalities in the execution of the will.⁴

By the *regula Catoniana* of the Roman law, which has been adopted by us, any will or provision of a will which was invalid *ab initio*—that is, which would have been void if the testator had died at the date of its execution—cannot become valid through a change of circumstances,⁵ whether such invalidity was due to some fact connected with the testator, with the property disposed of, or with the person in whose favour the will or disposition is made.⁶

By the earlier Roman law, testaments became invalid after their execution, amongst other things, upon failure of adiation by the instituted heir, either through

¹ Voet, 28 : 3 : 1.

² G. 2 : 24 : 4.

³ *Executors of Cerfonteyn v. O'Haire*, 3 Buch. 129. In the case of *Melville and others v. Executors of De Villiers* (16 S. C. 557) an attempt was made to set aside a

will on the ground of error, but without success. The English authorities, however, were quoted.

⁴ Voet, 28 : 1 : 28; 28 : 3 : 2; G. 2 : 24 : 5.

⁵ Voet, 34 : 7 : 1.

⁶ Voet, 34 : 7 : 2.

the death of the heir before the testator,⁷ or through his refusing to adiate or repudiating the inheritance. The invalidity of the testament in those days carried with it the failure of the legacies contained in it and the complete frustration of the testator's wishes. In order to obviate this state of things, and to induce the instituted heir to adiate by ensuring to him a substantial interest in the testator's estate, a series of enactments was passed,⁸ amongst which were the *Lex Falcidia* and the *Senatus-Consultum Pegasianum*, which was later on consolidated with the *Senatus-Consultum Trebellianum* by the legislation of Justinian.⁹ By the *Lex Falcidia* a testator was not allowed to dispose of more than three-fourths of his estate by way of legacies; and, if he did, the instituted heir was entitled to retain at least one-fourth of the estate, which became known by the name of the *Falcidian portion*, the legacies being reduced *pro rata* for that purpose.¹⁰ Under the Pegasian and Trebellian laws, if a testator imposed a universal fideicommissum upon the instituted heir, the latter or fiduciary heir was entitled, upon handing over the inheritance to the fideicommissary heir, to retain one-fourth of the whole inheritance, which came to be known by the name of the *Trebellian portion*.

Both these enactments were adopted by and formed part of our common law.¹¹ The law, however, having reference to the invalidity of testaments due to the failure of heirs, became obsolete by reason of the

⁷ *Eksteen v. Eksteen's Executors*, 4 S. C. 13.

⁸ Hunter's Roman Law, 2nd ed., p. 749; Voet, 25: 2: 3.

⁹ Hunter, p. 821; Voet, 36: 1: 47.

¹⁰ *Dantu v. Widow Hart's Executors*, 1 Buch. 168; *Dwyer v. O'Flinn's Executor*, 3 Searle, 29; Voet, 35:

2; G. 2: 23: 20; V. D. L. 147; V. L., vol. 1, p. 413.

¹¹ *Dwyer v. O'Flinn's Executor*, 3 Searle, 29; *Dantu v. Widow Hart's Executors*, 1 Buch. 168; Voet, 35: 2; 36: 1: 47-59; V. D. L. 139; V. L., vol. 1, pp. 414 *et seqq.*

codicillary clause, which, as was shown above, was at first almost invariably inserted in testaments, and was afterwards presumed so to be even when it was not.¹² By virtue of this clause, express or implied, a testament which had technically failed through failure of the instituted heir was upheld as a codicil, and had all the practical effect of a testament. The reasons, therefore, which led to the enactment of the above laws had practically ceased, and the Falcidian and Trebellian portions were formally abolished by Act 26 of 1873, section 1.

The only way in which a testament or codicil which was originally valid can now be invalidated, is by a change of mind or revocation on the part of the testator, signified in due form of law; for it is a principle of our law that a man's will remains revocable or ambulatory until the last moment of his life, so much so that even an express agreement to the contrary made by him will be void.¹³

An action to set aside a will may be instituted at suit of any person who is interested in having it declared invalid, and in such an action it is not essential that all the parties interested in the will should be joined as co-defendants.¹⁴ It will be sufficient as a general rule to sue the executors of the testator's estate,¹⁵ or the person whose interest under the will it is specially intended to set aside.

¹² Voet, 28: 3: 14.

¹³ *South African Association v. Mostert*, 2 Buch. 268; Voet, 23: 3: 10; V. L., vol. 1, p. 325.

¹⁴ *Bekker v. Meyring*, 2 Menzies, 442.

¹⁵ *Scorey v. Scorey's Executors*, 1 Menzies, 234.

CHAPTER XVI.

THE REVOCATION OF WILLS.

THE revocation of a will may be made either in writing or by the destruction of the deed containing the will.

If made in writing, a revocation can only be made in express words contained in a will duly executed.¹

A will may also be revoked by the destruction of the will itself, or by the erasure of the testator's signature to it by the testator himself or by his direction.

The destruction of a will will not amount to a revocation unless made by the testator or by some one else by his directions, with the intention or object of revocation;² and the destruction, when proved, will be presumed to have been made with that intention until the contrary be proved.³ Even if the destruction is not proved, but the will, having been left in the testator's possession after its execution, disappears and cannot be found after his death, it will be presumed that the testator has destroyed it with the object of revocation, until the contrary be proved.⁴ But no such presumption will arise where the will was left in the

¹ *Horak's Heirs v. Widow Horak*, 2 Menzies, 402; *Ludwig v. Ludwig's Executors*, 2 Menzies, 449; Voet, 28: 3: 1, 8; G. 2: 24: 10, 11; Schorer, Note 169; V. L., vol. 1, pp. 325, 327. Perhaps it would be as well to mention here the *derogative* or *derogatory clause* (*clausula derogativa*), which was a clause inserted in a testament which provided that no later testament or codicil shall be valid or derogate from the one containing the clause, unless it contained a certain phrase or form of words.

A will containing such a clause could not be revoked by a subsequent will which did not contain the words, unless the testator by mistake used the wrong phrase or form of words, or unless he stated in the latter will that he purposely omitted the phrase or form of words (Voet, 28: 3: 10).

² Voet, 28: 4: 1, 3; G. 2: 24: 15; Schorer, Note 172.

³ Voet, 28: 4: 4.

⁴ *In re Beresford*, 2 S. C. 303; *Nelson v. Currey*, 4 S. C. 355; Voet, 28: 4: 4.

possession of a third party, and has disappeared whilst in his possession.⁵

As to the erasure of the testator's signature, it will have to be proved that it was made with the intention of revocation by the testator himself or by his direction, and an erasure made by the testator himself, whilst in a state of insanity, will not affect the validity of the will.⁶

Again, if the testator has executed a will in duplicate and retains both duplicates in his own possession, revocation will not be presumed unless both the duplicates are destroyed.⁷ But, if he has retained only one, and has delivered the other to a third party, revocation will be presumed from the destruction of the one in his own possession.⁸ The same rule does not, however, apply to the case of a notarial will, if the testator destroys the *grosse* or copy which has been handed to him by the notary, but leaves the original or *minute* intact in the notary's protocol.⁹

A sealed will may be revoked by the testator breaking the seals and opening the envelope with the intention of revocation; and where such a will is found with its seals broken and envelope opened, it will be presumed to have been revoked by the testator until the contrary be proved.¹⁰

The rule as to the revocability of wills extends even to a mutual will, which either party thereto may, as far as his own part of the will is concerned, revoke without notice to and without the consent or even knowledge of the other, and that not only whilst both

⁵ *In re Beresford*, 2 S. C. 303; *Menzies*, 425; V. D. L. 155; V. D. K., Voet, 28: 4: 4. Th. 330; Groen., Note 14 to G. 2:

⁶ *In re Odendaal*, 16 S. C. 271. 24: 15.

⁷ Voet, 28: 4: 1.

⁸ *Nelson v. Currey*, 4 S. C. 355.

⁹ Voet, 28: 4: 1; *In re Heron*, 2

¹⁰ V. L., vol. 1, pp. 326, 327; V. D. L., 155.

are still alive,¹¹ but also when one of them is dead, *provided the survivor has not accepted or enjoyed benefits under the will of the first-dying* contained in the mutual will.¹² Nor does this last proviso involve an exception to the rule, because a mutual or joint will, as already pointed out, though contained in one and the same deed or document, consists of two separate and distinct wills; ¹³ and, in the absence of any circumstance which may bring into play any other principle of law to the contrary, there is no reason why the rule as to the revocability of wills should not apply to each of these separate wills, just as well as if they were contained in separate and distinct documents. Such circumstances do, however, come in when one of the testators has died and the survivor has accepted benefits under the will of the first-dying, which is the only part of the mutual will which has then as yet come into force. If by such will the first-dying has disposed of part of the property of the survivor, the latter, by the ordinary testamentary principle of election,¹⁴ by accepting benefits under the will, becomes bound to allow his property to pass as the will of the first-dying directs.¹⁵

¹¹ *De Smidt v. Hoets*, 1 Searle, 286; *South African Association v. Mostert*, 2 Buch. 262; 3 Buch. 122; Voet, 28 : 3 : 11.

¹² *South African Association v. Mostert*, 2 Buch. 262, 264; 3 Buch. 122; 4 Burge, 405; 2 Holl. Cons., c. 275; *Watson v. Burchell*, 9 S. C. 5; *Williams v. Williams et al.*, 12 S. C. 392; Schorer, Note 168; V. L., vol. 1, pp. 318, 334; *Budge and another v. Executor of George Budge*, 20 S. C. 202; *Nel v. Estate of Nel*, 20 S. C. 302; *Maskew v. Estate of Maskew*, 22 S. C. 164.

¹³ *South African Association v. Mostert*, 2 Buch. 262; 3 Buch. 122; *Oosthuysen v. Oosthuysen*, 1 Buch. 56, 66; V. L., C. F., part 1 : 3 : 2 :

15, 16; 4 Burge, 404.

¹⁴ The principle of election has been applied in the following cases:—*Lucas v. Hoole*, 9 Buch. 143; *Pohl v. Aurret*, 5 E. D. C. 43; *Watson v. Burchell*, 9 S. C. 3; *Dantu v. Widow Hart's Executors*, 1 Buch. 173, 178; *Blignaut's Trustee v. Cilliers*, 1 Buch. 213, 215; *Cross's Executors v. Cross's Heirs*, 13 S. C. 322; *McMunn and others v. Powell's Executors*, 13 S. C. 27; *Klopper v. Smit*, 9 S. C. 167. See also Voet, 30 : 15; D. 31 : 67 : 8, and C. 6 : 42 : 25; the English cases of *Dillon v. Parker*, 1 Swanston, 396, and *Simpson v. Forrester*, 1 Knapp, and Williams on Executors, 7th ed., p. 1440.

¹⁵ *South African Association v.*

Nay, more, this property, to the extent to which it is disposed of by the will of the first-dying, has ceased to be his property, and becomes burdened with a fideicommissum in terms of that will.¹⁶ In one word, though the survivor is not prohibited from revoking his own part of the mutual will, he cannot revoke or alter the will of the first-dying with respect to his (the survivor's) property, because it has in fact ceased to be the survivor's property.¹⁷ There is nothing, however, to prevent a survivor from appointing a joint executor in a later will.¹⁸

The same rule applies where the mutual will, or rather the will of the first-dying, has by common consent directed how property belonging to the testators in common, whether it be the whole of the joint estate left *universitate*,¹⁹ or a special article of property left *re singulari*,²⁰ is to be disposed of after the death of the survivor.²¹ In this case also the survivor will not be entitled, after accepting benefits²² under the will of the first-dying, to make another will contrary to the will of the first-dying.²³

The consequences of the invalidity of a will, whether

Mostert, 2 Buch. 267; *Watson v. Burchell*, 9 S. C. 2; *Lucas v. Hoole*, 9 Buch. 143. As to who has a right to sue in such a case, see *Meiring's Executor Dative v. Meiring's Executors Testamentary*, 7 Buch. 93.

¹⁶ *Lucas v. Hoole*, 9 Buch. 142; *Oosthuysen v. Oosthuysen*, 1 Buch. 68; *Brand v. Brand's Executors*, 4 S. C. 324.

¹⁷ Per Connor, J., in *Oosthuysen v. Oosthuysen*, 1 Buch. 65, 68.

¹⁸ *Grimbeck's Executor v. Grimbeck's Executor*, 18 S. C. 397.

¹⁹ *Hofmeyer v. De Wet*, 1 Buch. 317; *Executor of Upton v. Upton*, 2 Roscoe, 42; *South African Association v. Mostert*, 3 Buch. 127; *Lucas v. Hoole*, 9 Buch. 132; *Brand's*

Executor v. Brand's Executors, 4 S. C. 320; *Trustee of Lutgens v. Executors of Lutgens*, 1 Menzies, 504; *Weise v. Burger*, 5 Searle, 253; G. 2: 15: 9; V. D. K., Th. 283.

²⁰ *Brits v. Brits*, 2 Menzies, 431; 1 Buch. 312; *Oosthuysen v. Oosthuysen*, 1 Buch. 51; *Olivier v. Olivier*, 3 Searle, 367; *Beneke v. Van der Vijver*, 22 S. C. 523.

²¹ *Barry v. Executor of Kunhardt*, 2 S. C. 89; *Smith v. Executors of Sayers*, Foord, 66. But see *Skead v. Fourie*, 3 Off. Rep., 183.

²² *Silver v. Silver's Executors*, 5 S. C. 29.

²³ *Oosthuysen v. Oosthuysen*, 1 Buch. 51.

it was so *ab initio* or has been revoked, is that the property of the deceased will have to be distributed amongst the heirs *ab intestato* just as if no will had ever been executed.

CHAPTER XVII.

THE INSTITUTION OF HEIR.

WE come now to the subject-matter of wills, the principal of which are the institution of heir and the bequest of legacies.

Under the Roman law the institution of heir was an essential part of a testament, without which the testament was void.¹ This rule, however, was never adopted by our common law, and consequently the institution of an heir has never with us been essential to the validity of a testament;² and much less is it so now under the statute law, which has taken away the administration of the estates of deceased persons from their heirs and vested it in executors.³

Under our common law, however, which was based in that respect upon the Roman law, a testator was bound to leave a certain portion of his estate, which was called the *legitimate portion*,⁴ to his descendants

¹ *Oosthuysen v. Oosthuysen*, 1 Buch. 61, 64.

² *Ibid.*, 1 Buch. 63; *Dantu v. Widow Hart's Executors*, 1 Buch. 176; *Batt v. Widow Batt*, 2 Menzies, 408; *Mills v. Thwaites*, 2 Searle, 187; Voet, 28: 1: 1; 28: 5: 1; V. D. K., Th. 290; Groen., De Leg., Inst. 2: 20: 34.

³ *Oosthuysen v. Oosthuysen*, 1 Buch. 64.

⁴ G. 2: 18: 5 *et seqq.*; Voet, 5: 2: 46 *et seqq.*, and 37: 6: 13; V. D. L. 131; V. L., vol. 1, pp. 345, 346. The following are some of the decisions of our Courts on the subject of legitimate portion:—*Sandenbergh v. Executors of Zibee*, 2 Menzies, 427; *Van*

and parents, and, under certain circumstances, also to his brothers and sisters; but this obligation was abolished by Act 23 of 1874, and at the present day there is perfect liberty of testation in this Colony, so much so that an agreement, whereby a person binds or limits his future liberty of testation, will be void unless it is contained in antenuptial contract.⁵ A testator may therefore institute as heir whomsoever he pleases, provided that the person instituted is competent to take under his will.⁶

Under the Roman law an institution of heir could be made only in a testament and not in a codicil,⁷ but with us it may be made either in one or the other, and in any part of the same.⁸ It may also be made in any form of words suitable to convey the meaning of the testator, provided that it is made clear that the person mentioned is instituted as heir and not merely named as a legatee.⁹ The heir may be indicated either by name or by description, but this must be done with sufficient distinctness so that there may be no doubt as to who is meant.¹⁰ As long as this object is attained, it does not matter if the name is incorrectly given or the description is inaccurate;¹¹ and the same rule applies to legacies and fideicommissa.¹² It has also been held in the same way that an error made in the name of a

Schoor's Trustee v. Muller's Executors, 3 Searle, 136; *Blignaut's Trustee v. Cillier's Executors*, 1 Buch. 206; *Letterstedt v. Letterstedt's Executors*, 4 Buch. 158; *Buyskes v. Russouw's Executors*, 5 Buch. 19; *Van Heerden v. Marais*, 6 Buch. 92; *Trustee of Clarence v. Reid*, 3 Searle, 122; *Marais v. Leibbrandt et al.*, 1 Roscoe, 231; *Kleinberg v. Ruthven*, 2 Roscoe, 76; *Blatchford v. Blatchford*, 1 E. D. C. 365; *Oosthuysen v. Estate of Oosthuysen*, (1903) T. S. 688,

⁵ Voet, 2: 14: 16.

⁶ G. 2: 18: 4.

⁷ G. 2: 17: 3; V. D. K., Th. 289.

⁸ G. 2: 18: 19; V. D. L. 132.

⁹ *Dwyer v. O'Flinn's Executor*, 3 Searle, 24, 25, 31, 32; *Brink v. Voigt*, 1 Menzies, 537; V. D. L. 132.

¹⁰ Voet, 28: 5: 2, 15; G. 2: 16: 2.

¹¹ *In re McInerney*, 9 S. C. 43; Voet, 35: 1: 2, 3; G. 2: 16: 2; 2: 19: 9. The same rule applies to the appointment of executors testamentary (*in re Jeffreys*, 12 S. C. 340).

¹² Voet, 35: 1: 10.

testator in the body of a will will not invalidate the instrument.¹³

An institution which is made directly dependent upon the choice or discretion of a third party is void; but one which is indirectly so dependent, such as one subject to a condition, the fulfilment of which is dependent upon the option or discretion of a third party, will be good.¹⁴ It may be either simple or conditional, but if conditional the condition must be possible, legal, and moral; impossible, illegal, and immoral conditions being regarded as not written, and rendering what was intended for a conditional institution unconditional.¹⁵

Conditions are either *potestative*, that is, such as are dependent upon the will or ability of the person upon whom they are imposed; or *casual*, that is, such as depend upon the occurrence of some uncertain event; or *mixed*, that is, such as are partly potestative and partly casual.¹⁶

A potestative condition must, as a general rule, be fulfilled by the person upon whom it is imposed,¹⁷ and that specifically in accordance with the testator's directions, though such fulfilment may be of no use to anybody.¹⁸ As to the time of fulfilment, the directions of the testator, if there are any, are to be observed.¹⁹

Casual conditions may validly be fulfilled either during the lifetime of the testator or after it, but potestative only after his death;²⁰ and if the heir makes any delay in such fulfilment, the Court will, upon application, fix a time within which it is to be made.²¹

¹³ *Zeeman's Executors v. The Master of the Supreme Court*, 12 S. C. 472.

¹⁴ Voet, 28: 5: 29.

¹⁵ Voet, 28: 7: 9-16; G. 2: 18: 20; V. D. K., Th. 310; Schorer, Note 136; V. D. L. 133; V. L., vol. 1, p. 369.

¹⁶ Voet, 28: 5: 10.

¹⁷ Voet, 28: 7: 24.

¹⁸ *Ibid.*, sec. 25.

¹⁹ *Ibid.*, sec. 26.

²⁰ *Ibid.*

²¹ *Ibid.*, sec. 27.

A potestative condition may consist either in doing or in abstaining from doing something. In the latter case the heir may claim the inheritance at once, but will have to give security for the restitution thereof in case of a breach of the condition.²²

Conditions may also be either divisible or indivisible, the former being such as are capable of fulfilment in parts or shares, the latter requiring to be fulfilled as a whole before the right to the inheritance can vest.²³

There may also be several conditions joined either conjunctively or disjunctively. In the former case all will have to be fulfilled; in the latter, it will be sufficient if only one is fulfilled.²⁴

A *modus* may also be attached to an institution, that is, a duty or obligation imposed upon the heir to apply the whole or a part of the inheritance in a certain way or to a particular purpose or object; the institution being in such a case regarded as unconditional and transmissible to the heirs of the instituted heir, if he should die after the testator, but before he has fulfilled or carried out the duty or obligation.²⁵ Such fulfilment will, however, be compulsory upon the heir if he accepts the inheritance, and he may be compelled to give security for its fulfilment at suit of any person interested in such fulfilment, unless, indeed, the heir himself is the only person interested in it.²⁶ It is essential, however, that the object or purpose of the obligation shall be possible, legal, and moral; impossible, illegal, and immoral obligations being regarded as not written.²⁷

The will may also give the reason (*causa*) which induced the testator to make the institution, but in

²² Voet, 28: 7: 6, 8; V. D. L. 133;
V. L., vol. 1, p. 369.

²³ Voet, 28: 7: 5.

²⁴ Voet, 28: 7: 29.

²⁵ Voet, 35: 1: 12.

²⁶ Voet, 35: 1: 12, 13; V. L., vol. 1, p. 371.

²⁷ Voet, 35: 1: 13.

such a case the fact that the reason given is erroneous will not invalidate the institution; ²⁸ and the same rule applies to legacies and fideicommissa. ²⁹ If, however, a testator, misled by a false report that the heir mentioned in a previous will is dead, appoints another heir in a later will, expressly stating that his reason for doing so is because the heir previously instituted is dead, it has been laid down that the person first instituted will be heir; ³⁰ and the same rule holds with respect to fideicommissa. ³¹

The institution may be made to date from a specified day, or to last up to a particular day, whether such a day be certain or uncertain to arrive. ³² In the former case the inheritance will not vest till the arrival of the prescribed day, the heirs *ab intestato* being entitled to the inheritance or the usufruct thereof in the meanwhile. In the latter case the instituted heir will be heir up to the specified time, when he will have to hand over the inheritance to the heirs *ab intestato* or the fideicommissary heirs, just as if he had been burdened with a universal fideicommissum in their favour. ³³

An heir may be instituted either simply or to a particular thing or share of the inheritance. ³⁴

A penalty may also be attached to an institution to become due in case the heir fails to carry out any of the directions of the will, ³⁵ or in case he disputes the will of the testator. In the latter case, however, the heir will not become liable to the penalty, if he is

²⁸ Voet, 34: 6: 1; 35: 1: 9, 10; G. 2: 23: 7.

²⁹ Voet, 35: 1: 10.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Voet, 28: 7: 32; G. 2: 18: 21; V. D. K., Th. 211.

³³ Voet, 28: 7: 32; 4 Holl. Cons., cons. 141; G. 2: 18: 21; V. L., vol. 1, p. 368.

³⁴ Voet, 28: 5: 26; G. 2: 18: 19; V. D. K., Th. 209.

³⁵ Voet, 34: 6: 3; V. L., vol. 1, p. 370.

successful in impugning the will, or had reasonable grounds for his action, even though unsuccessful, his only object having been to obtain a decision as to the law or as to the meaning of the will.³⁶

The institution may be made either directly or by way of substitution, that is, by nominating some other person to be heir in case the instituted heir fails—that is, is either unwilling or unable to succeed.³⁷

Substitution is either ordinary or fideicommissary.³⁸ The latter deserves to have a place to itself, and will be treated of under Fideicommissa. Ordinary substitution is either simple or conditional,³⁹ and may consist of one or more degrees.⁴⁰

The substitution will only take effect when the contingency, for which it was intended, arrives; but when it does, it has the same force and effect as an ordinary direct institution.⁴¹

CHAPTER XVIII.

THE VESTING AND ACQUISITION OF THE INHERITANCE.

IN considering the subject of the acquisition of an inheritance by the heir, whether *ab intestato* or under a will, we must distinguish between the vesting of the right to an inheritance and the right to actually claim delivery of it.

³⁶ *Wright v. Wright's Executors*, 5 Searle, 347; *Pohl v. Auret*, 5 E. D. C. 43; *Cross's Executors v. Cross's Heirs*, 13 S. C. 322; Voet, 5: 2: 19; 34: 6: 3.

³⁷ Voet, 28: 6: 1, 10-13; V. L.,

vol. 1, p. 372.

³⁸ Voet, 28: 6: 1, 15; 36: 1: 1.

³⁹ Voet, 28: 6: 3.

⁴⁰ G. 2: 19: 4.

⁴¹ Voet, 30: 11; 28: 6: 14.

No one can have a vested interest in the estate of a deceased person, unless he survive him or her.

In succession *ab intestato*, the right to the inheritance vests immediately upon the death of the person whose estate is in question.¹ The rule is the same with a testamentary inheritance whenever certain specific individuals have been instituted heirs simply, *i.e.* unconditionally,² but not where the heirs have been indicated by a generic name, such as the "children" or "grandchildren" of a particular person. In this latter case no general rule can be laid down, except that the object must always be to ascertain the testator's intention, which is to be gathered from the context of the will and the surrounding circumstances of each case.³

The death of the testator will not be the date of the vesting of the right of inheritance, if the will clearly indicates an intention to the contrary.⁴

In the case of conditional institutions, the condition may be of such a kind as to suspend the vesting of the inheritance until the fulfilment of the condition. A *casual* condition and a *mixed* condition,⁵ in so far as it is casual, must absolutely be fulfilled before the institution can take effect and the right of inheritance vest; whereas a *potestative* condition is often regarded as fulfilled when it is not really fulfilled.⁶ Whilst, for instance, the institution is void if the non-fulfilment of a potestative condition is due to the testator himself or to the instituted heir,⁷ this will not be the

¹ Voet, 36: 1: 26.

² *Hiddingh v. Denysen*, 3 S. C. 441; Voet, 29: 2: 18; 30: 39.

³ *Wentzel v. Brink's Executors*, 9 S. C. 328; *Spengler v. Executors of Higgs*, 1 Roscoe, 228; *Bresler v. Kotze's Executors*, 2 Menzies, 444; *In re Henning*, 7 S. C. 53; *Black and*

others v. Executors of Black and Black, 21 S. C. 555. See also p. 180 below.

⁴ *In re Mutery's Will*, 5 S. C. 39; *In re Bergh*, 7 S. C. 307.

⁵ See above, p. 143.

⁶ Voet, 28: 7: 18.

⁷ *Ibid.*

case if it is due to the act of a third person towards whom the fulfilment is to take place or whose interest it is to prevent the fulfilment.⁸ But if the non-fulfilment is due to accident or to the act of a third party, who has no interest in the matter, rendering the fulfilment impossible, we have to inquire whether such accident or act occurred during the lifetime of the testator or after his death. If the former, the condition will be considered as fulfilled and the institution good, if the testator was aware that this fulfilment had become impossible, but not otherwise;⁹ if the latter, the condition is regarded as having failed, and the institution will be void.¹⁰

A condition which cannot possibly fail, and one which is dependent upon the fact of something having happened in the past or being in existence at the present, does not suspend the testator's disposition, which will take effect immediately upon his death, but it will nevertheless have to be fulfilled.¹¹

If a condition has reference to the happening of some event in the future, when that event has actually already taken place in the past—*e.g.*, "If Charles shall marry," when Charles was already married at the time of the execution of the will—then, if the testator was ignorant of the fact, the institution will be regarded as unconditional; but, if the testator was aware of it, he is understood as having referred to another future event of the same sort, such as a second marriage in the case supposed, and the condition will have to be fulfilled, unless in the nature of things the event referred to can only happen once, in which case the condition will be impossible and regarded as not written.¹²

⁸ Voet, 28 : 7 : 19.

⁹ *Ibid.*, secs. 20, 21.

¹⁰ *Ibid.*, secs. 21, 22.

¹¹ *Ibid.*, sec. 17.

¹² *Ibid.*, sec. 28.

Upon the fulfilment of a condition, the institution takes effect retrospectively to the date of the testator's death, and the rights of the instituted heir will be calculated upon the same basis as if the institution had from the beginning been unconditional.¹³

In the case of a mutual will, the right to succeed to an inheritance upon the death of the survivor vests, as a general rule, upon the death of the first-dying,¹⁴ and consequently only those instituted heirs who are alive at that date can claim any share in the inheritance.¹⁵

The actual acquisition of the inheritance itself requires a voluntary act on the part of the heir, namely, an acceptance by him. Such acceptance was under the Roman law called *adiation*,¹⁶ and carried with it grave responsibilities, for the heir thereby stepped absolutely into the shoes of the deceased, becoming, on the one hand, the owner of all his property and acquiring all his rights, and, on the other, becoming thereby at least in early times liable for the payment of the debts of the deceased¹⁷ and of the legacies left by him. Different expedients were accordingly introduced from time to time by that law for the protection of the heir against the consequences of a too hasty and rash *adiation*. Amongst these were *the right of deliberation*¹⁸ and *the benefit of inventory*.¹⁹ These expedients were taken over

¹³ Voet, 28: 7: 15; 30: 39.

¹⁴ *Nortje v. Nortje*, 6 S. C. 9; *Quin v. Board of Executors*, 3 Buch. 78; *Lucas v. Hoole*, 9 Buch. 132; *Marais v. Van Rensburg*, 1 Cape Times Reports, 10; *Rahl v. De Jager*, 1 S. C. 38; *De Ville v. Theunissen*, 8 Buch. 171; *Wannenburg v. Le Roux*, 12 S. C. 383. See also Chapter xxvii., n. 2, below.

¹⁵ *Spengler v. Executors of Higgs*, 1 Roscoe, 221. See also *Michau v. Michau's Executor*, 11 S. C. 362.

¹⁶ Voet, 29: 2: 3.

¹⁷ *Cooper v. Jocks*, 1 Kotze, 201.

¹⁸ Voet, 28: 8: 1-8, 13; G. 2: 21: 4; V. D. L. 150; V. L., vol. 1, p. 405.

¹⁹ Voet, 28: 8: 9 *et seqq.*; V. D. L. 151; V. L., vol. 1, pp. 405 *et seqq.*

and systematized by the common law of the United Provinces,²⁰ and in course of time formed part of the common law of this Colony; but, owing to the statutory changes introduced by Ordinance No. 104 of 1833, which takes the administration and distribution of the estates of deceased persons away from the heir and vests them in executors, the right of deliberation and the benefit of inventory have both become obsolete.²¹ Adiation in the Roman law sense of the term has also ceased to exist, its nearest equivalent under our law being the taking out of letters of administration by the executor, whether testamentary or dative, which amounts to an adiation with benefit of inventory, and which takes place as a matter of course and of legal routine, if not *ipso jure*.²²

The adiation, therefore, by the heir *quod* heir has been reduced to the mere acceptance by him, after the payment of the debts and legacies, of the residue of the unrealized assets or net balance of the estate, when transferred, delivered, or paid over to him by the executor, and which he is at liberty to accept or repudiate as he thinks fit. In this sense, however, the adiation of an inheritance may still be a matter of considerable importance, because of the responsibilities it may involve under the special terms of the will and by virtue of the doctrine of election which will be applicable in such a case.²³

Until such transfer or delivery by the executor to the heir has taken place, the heir cannot be said to be

²⁰ Voet, 28: 8: 2, 6, 11 *et seqq.*

²¹ *South African Association v. Mostert*, 3 Buch. 123; *Fischer v. Liquidators of Union Bank*, 8 S. C. 46. But see, as to Benefit of Inventory, *Ex parte Lesar*, 2 S. Af. Ren. 20.

²² *Oosthuysen v. Oosthuysen*, 1

Buch. 61.

²³ See *Theunissen v. Theunissen*, 1 Roscoe, 107; *Oosthuysen v. Oosthuysen*, 1 Buch. 61; *Van Schoor's Trustee v. Muller's Executors*, 3 Searle, 139; Voet, 29: 2: 7; G. 2: 22: 43.

the owner of any part of the deceased's estate, but is entitled to a right of action to compel the executor to transfer the ownership to him. This right is a real right or *jus in rem* requiring no registration, it being virtually registered *ipso jure* against the right or title of the executor, whether testamentary or dative, to deal with the deceased's property at all, the executor being, in fact, in the position of a fiduciary heir, and the heir-at-law in that of a fideicommissary heir. This right also is conclusive as against any third person laying claim to any portion of the deceased's property, but it is not conclusive as against any dealing by the executor with such property. If it were so, it would render any alienation by the executor of any portion of the residue or net balance of the estate absolutely null and void; but that this is not the case is clear from the fact that even in the case of a singular or specific *fideicommissum* the alienation of the fideicommissary property by the executor, who was at the same time the fiduciary, has been held to be not necessarily void.²⁴

With this simplification of our law many of the refinements and subtleties of the Roman law and our common law have become obsolete, but the following rules may still be regarded as applicable:—

Until the estate of an heir has been sequestrated as insolvent, he retains absolute liberty of repudiation, even though he may be in insolvent circumstances, and though the effect of such repudiation may be to deprive his creditors of the benefit of an amount which would otherwise have gone into his insolvent estate.²⁵ But

²⁴ See p. 184, below. For an interesting but very exceptional case, see *Keterman v. Stewart*, (1905) T. S. 677.

²⁵ *Van Schoor's Trustees v. Muller's Executors*, 3 Searle, 137; Schorer, Note 73. See also Mr. J. Henry's note to his Translation of V.D. L. 149.

after the sequestration of his estate, the insolvent's right of adiation or repudiation passes to his trustee, as regards all inheritances to which he may be entitled at the time of and after such sequestration.²⁶

Neither adiation nor repudiation can be made before the right to the inheritance has vested.²⁷

An inheritance having once been adiated or accepted, cannot afterwards be repudiated,²⁸ nor, *vice versa*, can an heir claim to adiate after he has once repudiated.²⁹

Minors cannot adiate or repudiate without the consent of their guardians,³⁰ the consent of the Court even being required where the adiation or repudiation would involve an alienation of immovable property.³¹ Guardians may, however, validly adiate or repudiate without the consent of their wards.³²

A wife cannot adiate or repudiate without the consent of her husband; but he may adiate or repudiate on her behalf, not only without her consent, but even against her wish,³³ unless his marital power has been excluded by antenuptial contract and the wife has retained the full management of her own affairs.

The adiation must be unconditional and the inheritance accepted as a whole,³⁴ upon the terms and conditions and with all the burdens attached to it by the will, in accordance with the principle of election.³⁵

Prælegacies are not lost by repudiation of the

²⁶ *Van Schoor's Trustees v. Muller's Executors*, 3 Searle, 137; Ord. 6, 1843, sec. 48.

²⁷ Voet, 29 : 2 : 12, 25.

²⁸ Voet, 29 : 2 : 33; *Jones v. Goldschmidt*, 1 S. C. 109; Schorer, Note 73; G. 2 : 21 : 3.

²⁹ Voet, 29 : 2 : 33, 37; G. 2 : 21 : 3.

³⁰ Voet, 29 : 2 : 9, 10, 34; G. 2 : 21 : 12; Schorer, Note 150.

³¹ Voet, 29 : 2 : 34,

³² *Ibid.*, sec. 9.

³³ *Ibid.*, secs. 9, 34; G. 2 : 21 : 2; Schorer, Note 150.

³⁴ Voet, 29 : 2 : 12, 15, 17; G. 2 : 21 : 3, 6.

³⁵ *Lucas v. Hoole*, 9 Buch. 143; *Dillon v. Parker*, 1 Swanston, 396; *Theunissen v. Theunissen*, 1 Roscoe, 107; *Dantu v. Widow Hart's Executors*, 1 Buch. 173; Voet, 30 : 26; 27 : 2 : 1.

inheritance unless such seems to have been the intention of the testator.³⁶

By acceptance of the inheritance the heir becomes liable for the debts of the deceased, but only to the extent of what he has actually received by way of inheritance out of his estate.³⁷

Where several co-heirs have accepted the inheritance, each will be entitled to his proportionate share in the inheritance, and will also be at the same time liable to his proportionate share of the debts of the deceased,³⁸ at least to the extent of what he has actually received by way of inheritance,³⁹ unless the will expressly provides that the debts are all to be debited to one of the heirs; and even in that case the other heirs will be liable *pro rata* to make good any deficiency that cannot be recovered from the heir specially burdened.⁴⁰ When, however, two heirs are instituted, one to the assets in the Colony and the other to the assets in England, they will, with reference to their respective liability for the debts of the testator, be regarded as having been instituted in equal shares, but the colonial assets will go to one and the English assets to the other.⁴¹

Where, under Roman law, one of several co-heirs failed to become heir in any one of the ways in which an heir may fail, his share in the inheritance used to go to his co-heirs who had accepted, in proportion to their respective shares, by virtue of what was called the *jus accrescendi*, which right was surrounded with

³⁶ Voet, 29 : 2 : 38.

³⁷ *Union Bank v. Executors of Watson*, 1 Cape Times, 269; Voet, 29 : 2 : 19, 20, 22, 24, 26, 28-30, 32; *Watson's Executors v. Watson's Heirs*, 8 Juta, 283.

³⁸ Voet, 29 : 2 : 19, 20, 22, 24, 26,

28-30, 32; 20 : 1 : 1; G. 2 : 20 : 6; Schorer, Note 153.

³⁹ *Union Bank v. Executors of Watson*, 1 Cape Times, 269.

⁴⁰ Voet, 30 : 13.

⁴¹ Voet, 30 : 7.

many subtleties.⁴² But as this rule of the Roman law was based upon their legal maxim that no one could die partly testate and partly intestate, which maxim, as shown above, has never been recognized by our law, it may be laid down that the *jus accrescendi* between co-heirs, at least in so far as it depends upon the subtleties of the Roman law, does not obtain amongst us.⁴³ It must not, however, be regarded as abolished; for it obtains whenever such was the express or implied intention of the deceased person whose estate is in question. This intention is presumed as regards co-heirs *ab intestato*.⁴⁴

Between testamentary heirs it takes place whenever it appears from the will that such was the intention of the testator;⁴⁵ and, on the other hand, full effect must be given to any indication of an intention on the part of the testator to exclude it.⁴⁶ Where a testator has instituted his surviving sons and his grandsons by a predeceased son, if one of the grandsons fails to take, his share will accrue to the other grandsons mentioned, to the exclusion of the sons; but, if one of the sons fails, his share will go to the remaining sons and the grandsons as representing their deceased parent.⁴⁷

For the recovery of their inheritance, whether *ab intestato* or under a will, the heirs are entitled to a right of action which is of a mixed character, being real as regards property and real rights over property, which were vested in the testator at the time of the testator's death, but personal as regards personal rights

⁴² Voet, 29: 2: 29.

⁴³ Voet, 29: 2: 40; V. D. K., Th. 322; Schorer, Notes 152, 163, 182; V. L., vol. 1, p. 345.

⁴⁴ Voet, 29: 2: 39, 40; G. 2: 28: 43.

⁴⁵ Voet, 29: 2: 40; 28: 5: 26;

28: 6: 6; 36: 1: 71; Dantu v. Widow Hart's Executors, 1 Buch. 175; V. L., vol. 1, p. 365.

⁴⁶ De Jager v. Scheepers, 5 Buch. 86.

⁴⁷ Voet, 29: 2: 40.

which belonged to the testator at the time of his death, and also as regards all rights which have accrued to his estate since.⁴⁸ The action will lie against the executor of the deceased⁴⁹ or any other person who is in possession of the inheritance or of any property belonging to it without being able to show any title to the same,⁵⁰ or who, having been in such possession, has fraudulently ceased to have it,⁵¹ or who, having lost such possession without fraud, was at the time of such loss possessing as heir, or who is in possession of the proceeds of property or other moneys belonging to the estate.⁵² The object of such action is to have the plaintiff declared heir and entitled to the inheritance, and that together with all the fruits and profits already enjoyed, or, in case the defendant is some person other than the executor,⁵³ which might have been enjoyed.

These rights of action are lost by a prescription of thirty years.⁵⁴

Where the heir's rights are not disputed, but the executor is guilty of delay in filing his accounts and paying over what is due to him, the heir or any other person who is interested in the estate may summon the executor upon motion to show cause why he has not filed his accounts.⁵⁵

⁴⁸ Voet, 5: 3: 1, 2, 10, 13; 5: 4; V. D. L. 124.

⁴⁹ *Scorey v. Scorey's Executors*, 1 Menzies, 234.

⁵⁰ Voet, 5: 3: 7.

⁵¹ Voet, 5: 3: 8.

⁵² Voet, 5: 3: 1 *in fine*; Schorer, Note 202; Groen., Note 15 to G. 2: 18: 10; V. D. L. 124.

⁵³ V. D. L. 124.

⁵⁴ *Van der Byl and Haupt v. Scholtz*, 14 S. C. 483; Voet, 5: 3: 1 *in fine*; G. 2: 30: 4; Schorer, Note 202; Groen., Note 15 to G. 2: 18: 10.

⁵⁵ *Auret v. Haarhoff*, 1 Cape Times, 132. Ord. 104, 1833, sec. 33.

CHAPTER XIX.

COLLATION.

BEFORE the inheritance is actually distributed amongst the heirs it will have to be considered whether some of them are not liable to collation, *i.e.* the duty incumbent upon all descendants who wish to share as heirs in the succession to an ancestor or ascendant, either by will or *ab intestato*,¹ of bringing into hotchpot or massing with the inheritance of the deceased any property acquired from or on account of such ancestor during his lifetime.² Thus if a child, grandchild, or more remote descendant wishes to succeed to a parent, grandparent, or more remote ascendant, from whom he has during his lifetime received any property or money as his portion of inheritance, or as a marriage gift³ or otherwise, for his advancement in trade or business or such-like, he will, before the division of the inheritance, have to bring into or collate with the estate of such parent, grandparent, or other ascendant,⁴ either what he may have so received or enjoyed, or the true value of the same, at his option,⁵ so that the whole inheritance thus augmented may then be divided in terms of the will of the testator or according to the law of succession *ab intestato*.⁶

¹ Voet, 37: 6: 2; V. L., vol. 1, p. 449. The duty to collate attaches only to descendants claiming to share in an *inheritance*, and does not apply to such as claim *legacies* or *prelegacies* only (*Meyer v. Estate of Meyer*, 19 S. C. 227).

² Voet, 37: 6: 1, 3, 4, 11, 13; 37: 7: 1, 4; V. L., vol. 1, p. 449.

³ Voet, 37: 7: 1-4; V. L., vol. 1, p. 449.

⁴ Voet, 37: 6: 9, 12; 37: 7: 2.

⁵ When the value is collated, it will have to be taken such as it was at the date of the gift, in case the property was given without any value being placed upon it; but, if a value was placed upon it, then such value must be taken (Ord., April 1, 1580, sec. 29).

⁶ Ord., April 1, 1580, sec. 29; *Jooste v. Jooste's Executor*, 8 S. C. 291; *Richert's Heirs v. Stoll*, 1 Menzies, 566; Voet, 37: 6: 1, 3.

The collation is regarded as made at the date of the death of the person whose estate is in question,⁷ and, if there is any doubt as to the amount which has to be collated, the statement of the parent or other ancestor will have to be accepted, until the contrary be proved.⁸

The following classes of benefits are subject to collation :—

1. Property or money given to a child as a portion of his or her inheritance.⁹

2. Marriage gifts.¹⁰

3. Property or money given to a child for the purpose of advancement in trade or business or such-like.¹¹

4. All debts due by a child to a deceased ancestor, whether by way of contract, such as loan, purchase and sale, suretyship, etc., or by way of delict, and that whether the debt was due by the child himself or his intermediate parent, through whom he comes to the succession of such ancestor,¹² and whether such child be heir to the intermediate parent or not,¹³ and although the debt may have been incurred at a time beyond the period of prescription.¹⁴

Money spent upon study and travel in foreign parts need not be refunded, unless such was the intention of the parent and the presumption is against such intention, nor is the presumption regarded as rebutted unless

⁷ Voet, 37 : 6 : 9.

⁸ Voet, 37 : 6 : 24; 37 : 7 : 5; 1 Holl. Cons., c. 130; 2 Holl. Cons., c. 106, 233.

⁹ Ord., April 1, 1580, sec. 29.

¹⁰ *Ibid.*; Voet, 37 : 6 : 3, 13; 37 : 7 : 1, 3, 5.

¹¹ Ord., April 1, 1580, sec. 29; *Jooste v. Jooste's Executor*, 8 S. C. 292.

¹² Voet, 37 : 6 : 4, 14, 15; *Richert's Heirs v. Stoll*, 1 Menzies, 566; *De*

Villiers v. Executor of Wehr, 2 Searle, 297; *Van Heerden v. Marais*, 6 Buch. 92; *Van Schoor's Trustees v. Muller's Executors*, 3 Searle, 141.

¹³ Voet, 37 : 6 : 14. But see *Children of Fehrzen v. Widow Horak*, 2 Menzies, 412, in which, however, Voet, 37 : 6 : 15, was not quoted.

¹⁴ *Van Heerden v. Marais*, 6 Buch. 92; *Jooste v. Jooste's Executors*, 8 S. C. 288.

there be clear evidence of an intention to the contrary in the form of an express declaration made by the father at the time of the gift, or an entry of these expenses made in the father's books debiting the son with the same, or an open declaration made by the father that he intended such collation to be made; or, according to some authorities, unless there be an excessive inequality in the expenditure upon the different children, as where a parent who has but a small estate has spent a large sum upon the study and travel of one child to the prejudice of the rest. In addition to this, if the father had, at the time of such expenditure, property belonging to the son upon whom the expenditure was incurred, under his legal administration, he is presumed to have intended the expenditure to come out of his son's funds rather than his own.¹⁵

Mere necessary maintenance, provided it is not unreasonable in amount when the birth and rank of the child are considered, need not be collated, even if the parents have declared by will that such was their wish.¹⁶

Simple donations, other than those above mentioned, are not subject to collation except in two cases—namely, where the parent in making the gift expressly attached collation to it as a condition, and where marriage gifts have been given to some of the children and only simple donations to the others, and the marriage gifts are made subject to collation.¹⁷

Remuneratory donations, *i.e.* such as are given as a reward for services rendered, need not be collated.¹⁸

¹⁵ Voet, 37: 6: 21, 22.

¹⁶ Voet, 37: 6: 21.

¹⁷ Voet, 37: 6: 13; V. L., C. F., part 1: 3: 13: 16; Wassenaar, Pract. Jud., cap. 11, n. 55; 1 Holl. Cons.,

c. 14 *in fine*, and vol. 5, c. 120 *in fine*; *Jooste v. Jooste's Executors*, 8 S. C. 291.

¹⁸ Voet, 37: 6: 13.

Money necessarily expended by the collator upon the property to be collated, if the expenditure be of such a nature as not to be subject to set-off against the fruits gathered, may be deducted from the property to be collated.¹⁹

The fruits of property subject to collation which have been gathered during the lifetime of the parent will not have to be collated, but those gathered after the parent's death will.²⁰

Under Roman law collation was intended for the benefit of descendants only,²¹ but under our law collation may be claimed by a surviving parent or step-parent also, whenever there was community of property between the deceased parent and such surviving parent or step-parent.²² There is this difference, however, between collation to be made in favour of descendants and that in favour of a surviving spouse, that in the latter case not only the descendants of the deceased spouse, but also his blood-relations who succeed to him, are bound to make collation.²³

Outsiders are not entitled to claim collation, and consequently, if an outsider has been instituted heir together with children, the children will not be bound to collate in his favour. In such a case the inheritance will first have to be divided between the children and the outsider without collation in terms of the testator's will; and after the outsider has been paid out, the portions of the children will have to be massed together, and, collation having been made by them, a fresh division will then have to be made between them.²⁴

Collation may, however, by the express terms of a

¹⁹ Voet, 37 : 6 : 24.

²⁰ *Ibid.*

²¹ *Ibid.*, sec. 6.

²² Voet, 37 : 6 : 7; *Scheepers v.*

Scheepers' Executrix, 3 Buch. 83.

²³ Voet, 37 : 6 : 8.

²⁴ Voet, 37 : 6 : 6.

testator's will or a donor's gift, be extended and made applicable to cases, persons, and things to which it would not otherwise be applicable under the common law.²⁵

Collation also only takes effect when nothing to the contrary has been provided by will, antenuptial contract, or some other deed, disposition, or contract ;²⁶ for the obligation may be remitted by the parent or other ancestor as far as descendants are concerned, but not to the prejudice of a surviving spouse.²⁷ Such remission need not be in express terms, but may be gathered by implication from the general context of the will,²⁸ or from the conduct of the ancestor ; but the mere fact that he has omitted to sue upon a debt for a time extending beyond the period of prescription will not be regarded as an implied remission.²⁹ Nor will the fact that the child has since the contracting of the debt become insolvent, and has received his discharge from his insolvency without the parent having proved upon his estate, do away with the necessity of collation.³⁰

The obligation to collate ceases if the descendant who is liable to it repudiates the inheritance ; and so much is this the case, that where a parent who has agreed to pay a *donatio propter nuptias* or other marriage gift dies without actually paying it, the child to whom it is due may repudiate the inheritance and sue for the amount of the donation or gift in the same way as any other creditor.³¹ But in such a case, if the repudiated inheritance goes by the *jus accrescendi* to other co-heirs, the latter may, under certain

²⁵ Voet, 37 : 6 : 6.

²⁶ Ord., April 1, 1580, sec. 29 ;
V. L., vol. 1, p. 449.

²⁷ Voet, 37 : 6 : 8 ; *Jooste v. Jooste's Executor*, 8 S. C. 292.

²⁸ Voet, 37 : 6 : 27.

²⁹ *Jooste v. Jooste's Executor*, 8 S. C. 288 ; *Van Heerden v. Marais*, 6 Buch. 92.

³⁰ *Steyn's Executors v. Steyn*, 11 S. C. 53.

³¹ Voet, 37 : 6 : 25.

circumstances, be bound to collate what the repudiating child would have had to collate.³²

Collation may, of course, be waived by the persons entitled to claim it after the death of the parent or other ascendant,³³ and, in cases in which agreements as to future successions are lawful, even during his lifetime.³⁴

CHAPTER XX.

FIDEICOMMISSA.

WE pass now to the subject of fideicommissary substitution or fideicommissary inheritance.

A fideicommissum is a testamentary disposition¹ which directs the heir, or some other person who takes a benefit under a will, to transmit or hand over the inheritance or other benefit so derived, either wholly or in part, either absolutely or upon the fulfilment of a condition,² to a third party. In other words, it is a bequest with a trust over in favour of a third party, for, where there is no trust over, there is no fideicommissum.³ Consequently a simple prohibition of alienation does not constitute a fideicommissum, unless some person is designated in whose favour or for whose

³² Voet, 37 : 6 : 25.

³³ *Ibid.*, sec. 28 ; *Scheepers v. Scheepers' Executrix*, 3 Buch. 85.

³⁴ Voet, 37 : 6 : 28.

¹ A fideicommissum may validly be constituted also by some deed *inter vivos*, such as a deed of donation or antenuptial or some other contract (Voet, 36 : 1 : 9, 67), but we are here confining our attention to testamentary fideicommissa.

² Voet, 36 : 1 : 6 ; G. 2 : 20 : 1 ;

V. D. L. 135, 136.

³ *Drew v. Executors of Drew*, 6 Buch. 203 ; *Hiddingh's Trustee v. Colonial Orphan Chamber*, 2 S. C. 273 ; *Zeederberg v. Zeederberg's Trustee*, 5 Searle, 266 ; 2 S. C. 431 ; *Trustee of Van der Byl v. Executor of Michau*, 2 S. C. 430 ; *Blignaut's Trustee v. Cellier's Executors*, 1 Buch. 206 ; *Castleman v. Stride's Executor*, 4 S. C. 30 ; *Lind v. Calitz*, 9 S. C. 268 ; G. 2 : 20 : 11 ; V. D. L. 136.

benefit the prohibition is made.⁴ The person upon whom the burden is imposed is called the *fiduciary*, and the person for whose benefit it is intended is called the *fideicommissary*. If the inheritance, either wholly or in part, has to be transmitted, the disposition is called a universal fideicommissum or fideicommissary inheritance; if only a particular thing or things or a certain sum of money has to be handed over, it is called a particular or singular fideicommissum.⁵

A particular fideicommissum may be imposed either upon an heir or upon a legatee: in the former case it is merely a legacy, and in the latter it is a particular fideicommissum in the proper sense of the term; but, as the rules applicable to legacies and particular fideicommissa are exactly the same, we shall deal with the latter when treating of Legacies.⁶ We are here dealing mainly with fideicommissary inheritances, though singular fideicommissa will occasionally be alluded to.

We should premise, however, that care should be taken not to confuse a fideicommissum with a usufruct. In the case of the legacy of a usufruct, the right to claim ownership of the subject-matter of the usufruct vests in the heirs of the testator immediately upon his death, the legatee merely having the enjoyment of the usufruct;⁷ but, in the case of a fideicommissum, the right to claim the ownership in the property vests in the fiduciary, and will only pass to the fideicommissary if he survives till the fideicommissum becomes due.⁸

⁴ Voet, 36: 1: 27.

⁷ Voet, 36: 1: 26.

⁵ Voet, 36: 1: 2.

⁸ *Klopper v. Smit*, 9 S. C. 167;

⁶ Voet, 30: 2.

Voet, 7: 1: 12, 13.

CHAPTER XXI.

THE CONSTITUTION OF A FIDEICOMMISSUM.

THE first requisite of a fideicommissary inheritance is that the fideicommissary heir should be competent to take under the will, but it is not essential that the fiduciary should be so, since a fideicommissum may validly be transmitted through a fiduciary, who is incompetent, to a fideicommissary who is competent to succeed.¹

A fideicommissum may be constituted either in a will or a codicil,² without any registration being necessary to give it the effect of a real right.³

No special form of words is required,⁴ and it may be effected not only in express words, but also by necessary implication from the words actually used.⁵ It may also be either simple or conditional.⁶

The fideicommissary heirs may be indicated either individually or by their generic names, such as "children,"⁷ the "next of kin," or the "heirs *ab intestato*" of a particular person,⁸ or the members of "a certain family;"⁹ and in the last case the fideicommissum may consist in a prohibition to alienate out of the family.¹⁰ Such prohibition, however, does

¹ Voet, 30: 30; 36: 1: 21, 42.

² Voet, 36: 1: 8.

³ *Neethling v. Trustees and Creditors of Lutgens*, 2 Menzies, 315; Voet, 36: 1: 12; V. D. K., Th. 319; V. L., C. F., 4: 9: 12.

⁴ *In re Beck*, 1 Menzies, 332; *De Geest's Executor v. De Geest's Executor*, 4 S. C. 95; Voet, 36: 1: 5.

⁵ *De Jager v. Muller's Executor*, 3 Buch. 55; Voet, 36: 1: 10, 11; Schorer, Note 149; G. 2: 20: 14; V. D. K., Th. 372.

⁶ Voet, 36: 1: 4, 13, 16-19; Schorer, Note 141.

⁷ Voet, 36: 1: 21 *et seqq.*

⁸ *Ibid.*, sec. 25.

⁹ *Ibid.*, secs. 27-31.

¹⁰ *Ibid.*, secs. 7, 27; *Du Plessis v. Smallberger*, 3 Searle, 383; *Lange v. Scheepers*, 8 Buch. 92; *Trustees of Jonker v. Executor of Jonker*, 1 Roscoe, 334; *Re Erasmus*, (1902) T. S. 124; *Joseph and others v. Mulder and others*, 18 S. C. 193; *Ex parte Van der Merwe*, (1903) T. S. 859;

not, as a general rule, extend beyond the fourth generation, unless it clearly appears from the will that such was the intention of the testator.¹¹ A mere mortgage, also, of the property burdened with a prohibition to alienate will not in itself be a contravention of such prohibition, seeing that such mortgage can only be enforced by a judicial sale, and, until there has been such sale, the property cannot be said to have been alienated to a stranger.¹²

Property may also be left for a specific purpose, with a prohibition to alienate added.¹³

A testator may also confer upon the fiduciary the power of selecting the person upon whom such property shall devolve at the expiration of the life interest, in which case the due exercise of such power has the same effect as if the testator had himself made the selection in his will.¹⁴

The fideicommissum may be imposed upon the inheritance as a whole or only on a certain part of it, or upon what is left over at the death of the fiduciary.¹⁵ The last of these is called a *fideicommissum residui*.¹⁶

CHAPTER XXII.

THE VESTING OF THE FIDEICOMMISSARY INHERITANCE.

The right to a fideicommissary inheritance, just as to any ordinary inheritance, vests, as a general rule, in

Ex parte Van Eeden and others, (1905) T. S. 151; Voet, 18: 1: 15; Schorer, Note 140; G. 2: 20: 12.

¹¹ G. 2: 20: 11, and Groen., note 22 thereon; Schorer, Note 144.

¹² *Joseph and others v. Mulder and others*, 20 S. C. 144.

¹³ See *Ex parte Trustees of the*

Boys' Mission School, Simonstown, 19 S. C. 305.

¹⁴ *In re Myburgh*, 13 S. C. 218; *Stanley v. Botha's Executor*, 17 S. C. 48; D. 31: 67; 1 Holl. Cons., c. 165.

¹⁵ Voet, 36: 1: 1; V. D. L. 136.

¹⁶ V. D. L. 137.

the fiduciary heir immediately upon the death of the testator,¹ and consequently he will be entitled to any interest or fruits which have accrued to the property since that date.²

The right to such inheritance will pass to or become vested in the fideicommissary heir immediately upon the arrival of the time prescribed by the testator, in whatever way that may happen, whether by the death of the fiduciary, the fulfilment of a condition, or otherwise. Consequently, if the fideicommissary dies after the fulfilment of the condition of the fideicommissum, but before the fideicommissary estate has actually been handed over to him, the right to claim the inheritance will pass to his heirs.³

A difficulty may sometimes arise as to who are to be admitted to claim as fideicommissaries when these are indicated not individually, either by name or description, but by some generic term, such as "children," "next-of-kin," etc. In such a case the question may arise as to whether only those individuals are to be admitted to the inheritance who were alive at the due date of the fideicommissum, or also the descendants of those who, having been alive at the death of the testator, have since died. Voet lays it down generally that, in the case of a fideicommissum in favour of the next-of-kin, no others are to be admitted as fideicommissary heirs than those who are such next of kin upon the arrival of the prescribed time or due date of the fideicommissum, whether that be the date of the fiduciary's death or of some other contingency;⁴ nor can those who are born after that

¹ *Hiddingh v. Denyssen*, 3 S. C. 441.

² *Ibid.*

³ Voet, 36 : 1 : 68 ; V. D. L. 137.

⁴ Voet, 36 : 1 : 26.

date acquire any right to the fideicommissum to the prejudice of these, unless there be a clear intention of the testator to the contrary.⁵ It is not necessary that a fideicommissary should be in existence at the time of the testator's death; it is enough if he has been either already born or at least conceived at the time the fideicommissum becomes due.⁶

CHAPTER XXIII.

THE RIGHTS AND DUTIES OF THE FIDUCIARY AND FIDEICOMMISSARY HEIRS.

THE first duty of the fiduciary in entering upon the fideicommissary inheritance is to frame an inventory,¹ and, if called upon, to give security for the restitution of the inheritance at the proper time,² and from these duties he cannot be relieved even by the testator.³ Children, however, are exempt from giving security to parents,⁴ and parents from giving security to children.⁵ But if a parent, being the survivor of two spouses, has been appointed fiduciary heir or usufructuary under the will of the first-dying, and marries a second time, he or she will, if required, be obliged to give security to the children of the first marriage.⁶ Brothers and

⁵ Voet, 36 : 1 : 26, sec. 32.

⁶ *Ibid.*

¹ Voet, 36 : 1 : 36, 54, 63; Schorer, Note 148; Ord. 104, 1833, sec. 14; *Smith v. Executors of Sayers*, Foord, 69; V. L., vol. 1, p. 386.

² G. 2 : 20 : 13; Schorer, Notes 146, 148; V. L., vol. 1, p. 386.

³ Voet, 7 : 9 : 2; Schorer, Note

148; *Smith v. Executors of Sayers*, Foord, 69; V. L., vol. 1, p. 386.

⁴ Brunneman ad C. 6 : 49 : 6 : 1; Huber ad D. 36 : 3; Schorer, Note 148.

⁵ Groen., Note b to G. 2 : 20 : 13.

⁶ *Furnivall v. Cornwell's Executors*, 12 S. C. 6; C. 6 : 49 : 6 : 1.

sisters are also exempted from giving security to each other.⁷

In some cases the security is limited. For instance, where the will provides that the fiduciary is to hand over to the fideicommissary heir only what is left of the testator's estate at the due date of the fideicommissum, the fiduciary is bound to give security for only one-fourth of the amount of the inheritance;⁸ and the same is the case where a testator burdens an heir with a fideicommissum, but at the same time gives him the right to alienate.⁹

Again, where two spouses married in community of property make a joint will instituting each other reciprocally as heir with the right of alienation, but on the condition that whatever is left over at the death of the survivor is to be divided equally between the heirs of the first-dying and of the survivor, the survivor is not bound either to frame an inventory or to give security,¹⁰ unless he or she marries a second time.¹¹

As long, however, as the security is duly given, the fiduciary will be entitled to the custody and administration of the fideicommissary property,¹² unless the testator has expressly left the same in the hands of his executor or has appointed a special administrator.¹³ But if the fiduciary be unable to find the necessary security, the Court will appoint a curator or receiver to take charge of the property, and to pay over the fruits or income derived therefrom to him.¹⁴

The fideicommissary property may not as a rule be

⁷ Voet, 36: 3: 6; Groen., Note b to G. 2: 20: 13.

⁸ Voet, 36: 1: 54; V. L., vol. 1, p. 381.

⁹ Voet, 36: 1: 66.

¹⁰ *Ibid.*, sec. 56; 4 Holl. Cons., c. 278, 285.

¹¹ C. 6: 49: 6: 1; *Furnivall v. Cornwell's Executors*, 12 S. C. 6.

¹² *Furnivall v. Cornwell's Executors*, 12 S. C. 6.

¹³ V. D. L. 138.

¹⁴ Voet, 36: 4: 3.

alienated, except for the purpose of paying the debts of the testator,¹⁵ or the legacies left by him, if there is no other property available for that purpose, or with the consent of all the parties interested in the fideicommissum,¹⁶ or unless the testator has given the fiduciary the right to alienate,¹⁷ which right of alienation may be conveyed not only in express terms but also by implication. Where, for instance, the will provides that the fiduciary is to hand over to the fideicommissary whatever is left of the testator's estate at the fiduciary's death, the latter may alienate *inter vivos* as much as three-fourths of the estate,¹⁸ and the same is the case where the testator has burdened the heir with fideicommissum, but at the same time given him leave to alienate.¹⁹ Again, where two spouses married in community have made a joint will instituting each other reciprocally as heir with the right of alienation, but on condition that whatever is left over at the death of the survivor is to be divided equally between the legal heirs of the first-dying and of the survivor, the fiduciary or survivor will be entitled to spend even the whole estate during his or her lifetime, but should anything be left over it will have to go to the fideicommissary heirs.²⁰

The Court will also under certain circumstances grant leave to sell immovable property belonging to the inheritance, provided that the proceeds thereof are re-invested or secured for the purposes of the fideicommissum.²¹

¹⁵ *In re Beck*, 1 Menzies, 332; *Van der Poel v. Colyn*, 2 Searle, 276; *In re Masters*, 1 Cape Times, 76; Voet, 18: 1: 15; V. D. L. 138.

¹⁶ *In re Meyer*, 13 S. C. 2; Voet, 36: 1: 62; V. D. L. 139.

¹⁷ Voet, 36: 1: 63.

¹⁸ Voet, 36: 1: 54; *McCarthy v. Newton*, 4 Searle, 64; G. 2: 20: 13;

Schorer, Note 146; V. D. L. 137; V. L., vol. 1, pp. 381, 382.

¹⁹ Voet, 36: 1: 66.

²⁰ *Ibid.*, sec. 56; Schorer, Note 146; *Brown v. Rickard*, 2 S. C. 314; *Klopper v. Smit*, 9 S. C. 167; 4 Holl. Cons., c. 278, 285.

²¹ Voet, 36: 1: 63, 70; Schorer, Note 144; V. D. L. 139.

The fiduciary may also validly dispose of perishable property, but in that case the proceeds of such property will have to be accounted for.²²

Any alienation made in contravention of the above rules will entitle the fideicommissary to a real action or *rei vindicatio* against any possessor of the property alienated, if such property be immovable, but not if it be movable.²³ This right of action, however, ceases if the fideicommissary becomes heir to the fiduciary, at least to the extent to which he is such heir.²⁴

Prescription does not begin to run in respect of fideicommissary property which has been alienated by the fiduciary pending the fulfilment of the condition upon which the property is to be restored, until the fulfilment of such condition.²⁵

Besides this real right, the fideicommissary is entitled, as security for the due restoration of the property due to him under the fideicommissum, to a tacit or legal hypothec over all property left by the testator to the fiduciary, but not over any property belonging to the fiduciary which has not been derived from the testator under the will constituting the fideicommissum; and for the enforcement of such hypothec he is entitled to an hypothecary action.²⁶ This tacit hypothec will, however, be lost if a bond is taken from the fiduciary, for this will be regarded as a novation of the debt.²⁷

In addition to these remedies, the fideicommissary is entitled to a personal action against the fiduciary.²⁸

²² Voet, 36 : 1 : 63; Schorer, Note 144.

²³ Voet, 36 : 1 : 64; *Brink's Curator v. Brink's Trustees*, 5 Searle, 329; G. 2 : 20 : 12, 13; R. Obs., part 1, obs. 42; Schorer, Note 147; V. D. L. 138.

²⁴ Voet, 36 : 1 : 64.

²⁵ *De Jager v. Scheepers and*

others, Foord, 120; Voet, 44 : 3 : 11.

²⁶ *In re Lutgens*, 2 Menzies, 312; *Brink's Curator v. Brink's Trustee*, 5 Searle, 329. See also *Minaar's Creditors v. Executor and Guardian of Neethling*, 3 Menzies, 71.

²⁷ *In re Lutgens*, 2 Menzies, 312.

²⁸ *Brink's Curator v. Brink's Trustee*, 5 Searle, 329; G. 2 : 20 : 12.

All these rights of action will be lost by a prescription of thirty years,²⁹ but prescription will only begin to run from the due date of the fideicommissum, or when the condition of the fideicommissum has been fulfilled.³⁰

A certain degree of diligence, varying according to circumstances, has to be exercised by the fiduciary in the care and custody of the fideicommissary property.

In this connection three cases have to be considered, namely, (1) the case where the heir is burdened with a particular fideicommissum or legacy, (2) where a legatee is burdened with a particular fideicommissum, and (3) where the heir is burdened with a universal fideicommissum. In the first case the heir is liable for all negligence, even the slightest.³¹ In the second, if the legatee, who is burdened with the fideicommissum, receives nothing under the will beyond what he has to hand over to the particular fideicommissary, and thus derives no benefit from the will, he will be liable only for fraud ; but, if he does take some benefit under the will, he will be liable for slight negligence also.³² In the third case the fiduciary heir is liable for fraud and for gross and slight negligence ; but if he has merely omitted to realize property when he ought to have done so, he will be liable for fraud and gross negligence, but not for slight negligence.³³

The fiduciary is not obliged to accept the fideicommissary inheritance, but may repudiate it.³⁴ If he does repudiate, the inheritance passes to the fideicommissary as of right.³⁵

²⁹ Schorer, Note 202 ; Voet, 5 : 3 : 1 *in fine*, and 33 : 1 : 1 *in fine* ; G. 2 : 30 : 4 ; Groen., Note 15 to G. 2 : 18 : 10.

³⁰ Voet, 36 : 1 : 64.

³¹ Voet, 30 : 50.

³² *Ibid.*

³³ *Ibid.*, and Voet, 36 : 1 : 39.

³⁴ Voet, 36 : 1 : 40.

³⁵ *Ibid.*, sec. 46.

If the fiduciary accepts and enters upon the inheritance, he will, upon the arrival of the time prescribed for that purpose by the will, be bound to hand over the inheritance to the fideicommissary;³⁶ and where one of two heirs, who are jointly instituted, is burdened with fideicommissum and afterwards acquires the whole inheritance by the *jus accrescendi*, he will have to restore to the fideicommissary not only the half of the inheritance to which he was originally instituted, but the whole inheritance actually acquired by him, unless it is clear from the context that the testator's intention was different.³⁷

Under the common law the fiduciary heir was entitled, when restoring the inheritance to the fideicommissary, to retain for himself one-fourth of the inheritance, which was called the Trebellian portion;³⁸ but this right was abolished by Act 26, 1873, sec. 1. The fiduciary is now therefore bound to restore the inheritance in full, and that in accordance with the inventory, if any, framed by him in entering upon the inheritance,³⁹ and reduced only to the extent of the alienations which he was by law entitled to make in accordance with the rules laid down above. He may, however, deduct the amount of any debt due by the testator to himself, which is still unpaid.⁴⁰

It must, however, be observed that the mere arrival of the due date of a fideicommissum does not place the fiduciary *in morâ*, and consequently interest does not begin to run until the fideicommissary heir has put in his claim, unless, indeed, the latter is ignorant of the fideicommissum in his favour.⁴¹

³⁶ Voet, 36: 1: 34-35, 36, 39; 7: 142, 143; V. D. K., Th. 315, 316.
9: 2.

³⁷ Voet, 36: 1: 38.

³⁹ Voet, 36: 1: 36; 7: 9: 2.

⁴⁰ Voet, 36: 1: 36.

³⁸ G. 2: 20: 6-10; Schorer, Notes

⁴¹ Schorer, Note 141.

The fiduciary, on the other hand, is entitled to recover from the fideicommissary heir any necessary expenditure incurred by him with reference to such inheritance, such as the costs of framing an inventory, and moneys expended in the permanent, but not the ordinary everyday, repair or restoration of buildings,⁴² or in permanent improvements effected by him, in the same way as any other *bonâ fide* possessor, and may enforce his claim not only by way of retention, but also by way of action;⁴³ nor is he bound to allow a set-off of the fruits enjoyed by him against such expenses.⁴⁴ But any increase in the value of the fideicommissary property whilst in the hands of the fiduciary, whether due to his industry or not, will go to the benefit of the fideicommissary.⁴⁵

Prælegacies left to the fiduciary may be deducted or not according to the intention of the testator, which is to be gathered from the will.⁴⁶

It is almost unnecessary to add that an executor testamentary, who has had the administration of the fideicommissary inheritance to the exclusion of the fiduciary heir, will not be entitled to deduct from the inheritance to be handed over to the fideicommissary any debt due by the fiduciary to the testator.⁴⁷

Where there are several fideicommissary heirs, the *jus accrescendi* will prevail amongst them in the same way as between direct heirs, as was shown above.⁴⁸

⁴² Voet, 36: 1: 61.

⁴⁶ Voet, 36: 1: 37; 30: 7.

⁴³ Voet, 36: 1: 61; 6: 1: 36; 6: 3: 53.

⁴⁷ *Colonial Orphan Chamber v. Hiddingh's Executors*, 6 S. C. 59.

⁴⁴ Voet, 36: 1: 61.

⁴⁸ Page 154, above. See also Voet,

⁴⁵ *Ibid.*, sec. 56; *Brown v. Rickard*, 2 S. C. 314.

36: 1: 71.

CHAPTER XXIV.

THE EXTINCTION OF FIDEICOMMISSA.

A FIDEICOMMISSUM may, of course, at any time be revoked by the testator,¹ but there are several ways in which it may fail without such revocation.

It will lapse generally whenever the fideicommissary dies before the right to the fideicommissum has actually vested in him.² This will happen when he dies before the fiduciary, for it is a rule of our law that, in the absence of any clear provision in the will to the contrary, the inheritance will in that case belong to the fiduciary absolutely.³ The same will be the case if the fideicommissary dies whilst the condition attached to it is still pending, unless there be evidence of an intention of the testator to the contrary.⁴

According to Voet, a fideicommissary institution lapses also if the fiduciary dies before the testator, unless the will contains an ordinary as well as a fideicommissary institution, or unless the will contains the codicillary clause. This, however, is not the case with a particular fideicommissum imposed upon a legatee, which will survive even though the legatee predeceases the testator.⁵

It will further lapse upon failure of the condition upon which it depends, or the extinction of the family within which the property is retained by fideicommissum,⁶ or, in the case of a simple prohibition to

¹ Voet, 36: 1: 66.

² Voet, 7: 1: 13.

³ *De Geest's Executor v. De Geest's Executor*, 4 S. C. 95; *Van Dyk v. Executors of Van Dyk*, 7 S. C. 194; *Du Plessis' Executors v. Du Plessis' Executors*, 9 S. C. 58; Voet, 7: 1:

13; 34: 4: 12; 36: 1: 26; V. D. L. 140. With respect to the presumption as to priority of death, see Voet, 34: 5: 3.

⁴ Voet, 36: 1: 67; V. D. L. 139.

⁵ Voet, 36: 1: 69.

⁶ Voet, 36: 1: 65; V. D. L. 139.

alienate out of the family, upon the extinction of the fourth generation.⁷

A fideicommissum may also be extinguished by the renunciation, either express or tacit, of the fideicommissary,⁸ or with the consent, either express or tacit, of all the parties interested in it.⁹

In the last resource it may be extinguished by Act of Parliament.¹⁰

CHAPTER XXV.

LEGACIES.

UNDER the earlier Roman law certain distinctions were drawn between legacies and particular or singular fideicommissa,¹ but these distinctions were abolished by Justinian, and the same rules of law now apply to both.²

A legacy is a gift of a particular thing or things made or left by a testator in his last will, whether testament or codicil, to a particular person, who is called the legatee.³ Whoever is competent to succeed to the testator is competent to take a legacy under his will, which competency will have to exist not only at the date of the execution of the will and of the testator's death, but also at the date of his claiming the legacy, and, in the case of conditional legacies, also at the time of the fulfilment of the condition.⁴ A bequest may, however, validly be left to a person who is incompetent

⁷ Voet, 36: 1: 33; G. 2: 20: 11; 317; V. D. L. 140; G. 2: 1: 38, 39.
 Schorer, Note 144; *Rykklief's Heirs*
 v. *Rykklief's Executors*, 13 S. C. 64.

⁸ Voet, 23: 2: 85; 36: 1: 65.

⁹ Voet, 36: 1: 65; V. D. L. 140.

¹⁰ Voet, 36: 1: 70; V. D. K., Th.

¹ Voet, 30: 13.

² Voet, 30: 2.

³ Voet, 30: 1.

⁴ Voet, 30: 3, 10.

to succeed, upon the condition, "if at any time he shall be able to take"; in which case it will not be necessary that the legatee should be competent to take either at the date of the execution of the will or of the death of the testator.⁵

A valid bequest may also pass through a person who is incompetent to take to one who is competent.⁶

As to the subject-matter of legacies, a testator may bequeath not only his own property, but also that of the heir or of a third party, but not property belonging to the legatee himself.⁷

A legacy of the testator's own property is valid even though at the time of the bequest the testator was under the impression that it belonged to the legatee or a third party.⁸ Such property can only pass subject to all its legal incidents, and therefore it cannot be exempted by the testator from liability for his debts.⁹

Where the common property of the testator and a third party is bequeathed, only the testator's share therein is in case of doubt presumed to be bequeathed, whether the testator did or did not know that it was such common property.¹⁰ But if the testator in his lifetime acquires the whole of the property and possesses it as one undivided whole, the legatee will be entitled to claim the whole. The same is the case where the property is common to the testator and the heir.¹¹

Where the testator has bequeathed the property of the heir, the principle of election comes in, and the

⁵ Voet, 30; 3, 10, sec. 10.

⁶ *Ibid.*, sec. 9.

⁷ *Ibid.*, secs. 26, 29; G. 2: 22: 36.

⁸ G. 2: 22: 32, 33.

⁹ *Hiddingh's Trustee v. Colonial Orphan Chamber*, 2 S. C. 277.

¹⁰ *Watson v. Burchell*, 9 S. C. 2;

Cross's Executors v. Cross's Heirs, 13 S. C. 322; 14 E. D. C. 87; Voet, 30: 28; Schorer, Note 161.

¹¹ Voet, 30: 28; *Van der Merwe v. Executors of Van der Merwe*, 7 Buch. 89; Schorer, Note 161.

heir, if he accepts the inheritance, will be bound to fulfil the legacy.¹²

If the testator has bequeathed the property of a third party under the impression that it was his own, the legacy will be void, unless it is clear from the will that, even if he had known that it was not his own, his disposition with respect to it would have been the same.¹³ If, however, such a bequest is made knowingly, it will be valid,¹⁴ and the executor will be obliged to buy the property bequeathed, if it can be had for a reasonable price: if not, the legatee will be entitled to claim its value; and if there be any dispute as to the reasonableness of the price asked, the Court will have to decide.¹⁵ If the legatee, after the execution of the will, acquires the property for valuable consideration (*titulo oneroso*), e.g., by purchase, he may still claim its value from the executor; but where he acquires it without valuable consideration (*ex causâ lucrativâ*), e.g., by gift, he will not be entitled to claim either the thing itself or its value. If, therefore, property is bequeathed to a person under two distinct wills, he will do well first to obtain the value under one will, for he can then still claim the thing itself under the other; but, having once acquired the thing itself without valuable consideration, he has no claim to its value.¹⁶

A legacy of property belonging to the legatee himself is void even if the legatee afterwards alienates it in the lifetime of the testator,¹⁷ unless, indeed, the testator or some third party had some real right, such as the right of *superficies*, quitrent, tenure, usufruct or

¹² *Watson v. Burchell*, 9 S. C. 2; Voet, 30: 26; G. 2: 22: 25; V. D. L. 142.

¹³ *Executors of Cross v. Cross*, 14 E. D. C. 87; G. 2: 22: 40.

¹⁴ G. 2: 22: 38, 39.

¹⁵ Voet, 30: 26, 49, 56.

¹⁶ G. 2: 22: 41; Schorer, Note

162.

¹⁷ G. 2: 22: 36, 37.

mortgage (but not prædial servitude), over the property; in which case the testator is considered to have bequeathed his own right or that of the third party, and it will therefore be the duty of the executor to release the property from the burden of such right.¹⁸

There is no doubt, however, that the value of property belonging to the legatee may validly be left to him.

Only property which is *in commercio* may be left as a legacy, a legacy of property which is *extra commercium* being absolutely void, and the legatee not being entitled to claim even the value of the same.¹⁹

With this one limitation every kind of property may be the subject of a legacy, present as well as future, movable and immovable, corporeal and incorporeal. For legacies of special kinds of property, such as rights of action,²⁰ releases from debt,²¹ and personal²² and prædial servitudes,²³ reference may be had to Voet's Commentaries,

CHAPTER XXVI.

THE MODE OF BEQUEATHING LEGACIES.

No special form of words is required for the bequest of a legacy, but it may be made in any words suited to convey the meaning of the testator, an unintelligible bequest being regarded as not written.¹ It cannot,

¹⁸ Voet, 30: 29; 34: 7: 1.

¹⁹ Voet, 30: 17, 30, 49; G, 2: 22: 7, 42; V. D. L. 142.

²⁰ Voet, 30: 20, 25,

²¹ *Ibid.*, sec. 56,

²² Voet, 32: 2.

²³ Voet, 33: 3.

¹ G, 2: 23: 2, 3; Voet, 34: 8: 2; V. D. L. 140.

however, take place by implication, except by necessary implication from the words actually used in the will.²

The legatee may be indicated either by name or description; and, provided it is clear what person is referred to, an error in the name or description will not be fatal.³

A bequest may be made either simply or conditionally, or for a certain object or purpose (*modus*), or for a certain reason (*causa*).⁴ Where the condition or *modus* fails, the legacy also fails;⁵ but not where the reason given by the testator for making the bequest turns out to be erroneous.⁶

Where the amount of a legacy, which has been left for a particular purpose, is found to be in excess of the requirements of such purpose, the excess will have to fall back into the body of the estate for division amongst the heirs.⁷

A legacy may also be left by way of penalty upon the heir or some other person benefited by the will, for the omission or commission of some act;⁸ but in that case, if such omission or commission be impossible or contrary to law or morality, the bequest will be void.⁹

Things may be left not only singly but collectively in a mass, *e.g.*, a certain portion of the testator's estate.¹⁰

They may be left not only specifically, as where a particular article is indicated either by name or by way of description,¹¹ but also generically, as where the

² *Morison v. Morison's Executors*, 9 Buch. 24.

³ V. D. L. 141; V. L., vol. 1, p. 390.

⁴ Voet, 7: 1: 5; 30: 36; 35: 1: 9; G. 2: 23: 6.

⁵ *Consistory of Dutch Reformed Church v. The Master*, 8 S. C. 181; Voet, 35: 1: 9; 28: 7: 6; G. 2; 23: 8.

⁶ Voet, 35: 1: 9; G. 2: 23: 7; V. D. L. 141.

⁷ *Donaghy v. Estate of Hablutzel*, 22 S. C. 162.

⁸ Voet, 34: 6: 1; 28: 7: 6; G. 2: 23: 12; V. D. L. 141.

⁹ Voet, 34: 6: 2.

¹⁰ Voet, 30: 19.

¹¹ Voet, 35: 1: 2.

testator bequeaths one or more articles or a certain weight or quantity of a certain *species* or *genus* of things.¹² In the latter case, if no article of the specified kind is to be found in the estate at the testator's death, the necessary article or articles will have to be acquired and delivered to the legatee.¹³ But, if the testator bequeaths *his* wine, the legacy will be void, if no wine is found in the estate.¹⁴

In the case of the legacy of a choice, such as the choice of a horse, the legatee will be entitled to choose from all the articles of the kind mentioned which are found in the testator's estate at the time of his death, not excluding even the very best;¹⁵ but in such a case, as well as in any other generic legacy, when a choice has once been made, it cannot afterwards be altered.¹⁶

If an error is made in the generic name of a thing, the legacy will be void; but this is not the case where the mistake is in the proper name of the thing, provided there is no mistake as to the identity of the thing bequeathed.¹⁷

In the same way a legacy will not be invalidated by an erroneous description of the thing bequeathed, provided the thing itself can be identified.¹⁸ But where through some ambiguity in the wording it cannot be decided which of two things is meant, the heirs may insist that the lesser of the two shall be given.¹⁹

A legacy which is left entirely to the discretion of the heir is void;²⁰ but it may validly be left to the discretion of the heir to which of two or more persons

¹² Voet, 30: 17, 18; 33: 5: 6.

¹³ Voet, 33: 5: 3, 4, 6; G. 2: 22: 30; Schorer, Note 159.

¹⁴ Voet, 33: 6: 3.

¹⁵ Voet, 33: 5: 1-5; 30: 25; G. 2: 22: 29.

¹⁶ Voet, 33: 5: 8.

¹⁷ Voet, 35: 1: 2; G. 2: 22: 11; V. D. L. 141; V. L., vol. 1, p. 390.

¹⁸ Voet, 35: 1: 4-6; G. 2: 22: 11; V. D. L. 141.

¹⁹ G. 2: 22: 12.

²⁰ Voet, 30: 36.

the legacy is to be paid or in what manner it is to be paid.²¹

A legacy may also validly be left to the discretion of the legatee, but in that case it is regarded as conditional; and if the legatee dies before he has expressed his wish, the legacy will be void and not transmissible to his heirs.²²

A legacy cannot be left expressly to the discretion of a third party, but it may be so indirectly, by making it conditional upon such third party doing or abstaining from some act.²³

A legacy may even be left to some person not named in the will, but whom the testator has mentioned verbally to his executor.²⁴

CHAPTER XXVII.

THE VESTING AND ACQUISITION OF LEGACIES.

A LEGACY, as a general rule, vests in the legatee immediately upon the death of the testator,¹ but this rule may vary according to the intention of the testator.

Where the legatee is a person who is already born at the time of the testator's death, and the will contains no intimation of a desire to suspend or postpone the vesting of the legacy, there exists a conclusive presumption that the testator intended it to vest and the *dominium* of the property to pass immediately upon his death.² If the bequest contains words of futurity, the

²¹ Voet, 30: 36.

²² *Ibid.*

²³ *Ibid.*

²⁴ Voet, 34: 9; 5.

¹ *Van der Westhuysen v. Estate of Van der Westhuysen*, 20 S. C. 57. Voet, 7: 3: 1.

² Voet, 30: 39; V. D. L. 145.

question will be whether they were inserted for the purpose of postponing the vesting or of merely deferring the fulfilment of the legacy, as where a bequest to one person is made subject to a life-interest in favour of another. In such a case the further question arises whether the person with the life-interest is a usufructuary or a fiduciary legatee. In the former case the legacy, as a general rule, vests in the remainderman immediately upon the death of the testator, and in the latter the vesting is postponed till the death of the fiduciary legatee;³ but this general rule may be modified by the express wording of the will, so as to postpone the vesting in the former case⁴ and to make it take effect sooner in the latter.⁵

The legacy of a choice vests immediately upon the testator's death; and if the legatee dies after the testator but before he has made his choice, the right of choice is transmitted to his heirs.⁶

A conditional legacy does not vest till the condition attached to it is fulfilled; so that, if the legatee dies in the meanwhile, the legacy will not be transmitted to his heirs.⁷ Where, however, the condition is impossible, illegal, or immoral, the condition is void and the legacy regarded as unconditional.⁸

Where there is a day or date attached to a legacy,

³ *In re Zipp*, 8 Buch. 132; *Nel v. Nel's Executrix*, 12 S. C. 444; *Van Breda v. The Master of the Supreme Court*, 7 S. C. 360; *Jones v. Matthews*, 14 S. C. 68; *Executors of Moodie v. Curator of Moodie*, 20 S. C. 464; *Ex parte Dixon and Coetzee*, 20 S. C. 441; Voet, 17: 1: 12 *in fine* and 13. See also p. 146, above.

⁴ *De Wet v. Hurter's Executors*, 5 Searle, 356; *Schoombie v. Olivier*, 15 S. C. 162; *In re Zondach's Will*, 19 S. C. 19; *Ex parte Gardiner*, 19

E. D. C. 18; *Sajira and others v. Executors of Ajouhaar*, 18 S. C. 119.

⁵ *Strydom v. Strydom's Trustee*, 11 S. C. 425; *Smit v. Smit's Executor*, 14 S. C. 142.

⁶ Voet, 33: 5: 4.

⁷ Voet, 28: 7: 3; 36: 1: 26; 36: 2: 3; V. D. L. 146; *Van Breda v. Master of the Supreme Court*, 7 S. C. 360; *Jones v. Matthews*, 14 S. C. 68.—*Quin v. Bartman*, 3 Buch. 78, overruled.

⁸ Voet, 36: 2: 4, 5; 28: 7: 15 *et seqq.*

the vesting will vary according as the day is a definite day (*dies certus*) or an indefinite day (*dies incertus*).⁹

Where the day is a definite day, *e.g.*, the 1st of April, the right to the legacy vests immediately upon the testator's death, though payment can only be demanded on the arrival of the day.¹⁰

An indefinite day may be one of three kinds, that is to say:—

(1) It may be uncertain as to when it will arrive, but still certain to arrive in the lifetime of the legatee.¹¹

(2) It may be certain to arrive, but uncertain whether it will arrive in the lifetime of the legatee.¹²

(3) It may be altogether uncertain as to when it will arrive or whether it will arrive at all.¹³

In the first case, as where the testator has bequeathed £100 to the legatee upon his (the legatee's) death, the legacy vests immediately upon the testator's death, and is transmitted to the legatee's heirs.¹⁴

In the second case the general rule is that the legacy is conditional upon the day arriving during the legatee's lifetime. Where, for instance, the testator has directed his heir to pay the legatee a certain sum upon his (the heir's) death, the legacy will fail if the legatee predeceases the heir.¹⁵ This general rule, however, is subject to modification by any expression of a contrary intention contained in the will.¹⁶

The same rule applies to the third case, that is, where it is altogether uncertain whether the day will arrive at all.¹⁷

⁹ Voet, 36: 2: 2.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Voet, 36: 1: 26; 36: 2: 2; V. D. L. 146.

¹⁶ *Van Breda v. Master of the Supreme Court*, 7 S. C. 363; Voet, 7: 1: 13; 36: 2: 2.

¹⁷ Voet, 36: 2: 2; V. D. L. 146.

In the legacy of an annuity, which is regarded not as one legacy but as separate legacies of the several annual payments, the legacy of the first payment vests, unless otherwise provided by the will, immediately upon the death of the testator, whilst each subsequent payment is conditional upon the legatee being alive upon the due date of the same.¹⁸

Legacies left in the mutual will of two spouses married in community will vest as a general rule upon the death of the first-dying; that is to say, as to one-half it vests absolutely, and as to the other half it vests subject to adiation or enjoyment of benefits by the survivor.¹⁹ This rule will hold even where the testators have in their will bequeathed property to certain legatees "after the death of the survivor," provided that from the rest of the will it is clear that they intended the legacy to vest upon the death of the first-dying.²⁰

Under the Roman law the effect of the vesting of an unconditional legacy of a specific thing was, immediately upon the adiation of the inheritance by the heir, *ipso jure* to transfer the ownership in the thing bequeathed direct from the testator to the legatee, without the necessity of any transfer or delivery of the same to the latter.²¹ This rule of the Roman law, which was based on a legal fiction,²² was taken over by the Roman-Dutch law,²³ but, originating as it did

¹⁸ Voet, 7: 3: 3; 33: 1; G. 2: 23: 14; V. D. L. 145; V. L., vol. 1, p. 400.

¹⁹ *Kotze v. Kotze's Trustees*, 2 Menzies, 414; *Rahl v. De Jager*, 1 S. C. 38; *Haupt v. Van der Heever's Executors*, 6 S. C. 49; *Van Rooyen v. Gorman*, 6 S. C. 55; *In re Henning*, 7 S. C. 53; *Steenkamp v. De Villiers*, 10 S. C. 56; *Wannenburg v. Le Roux*, 12 S. C. 383; *Williams v. Williams*

et al., 12 S. C. 392; *Olivier v. Estate of Schoombie*, 22 S. C. 342; *Skead v. Fourie*, 3 Off. Rep. 183. See also p. 149, above.

²⁰ *Weise v. Weise and Burger*, 5 Searle, 253; *Quin v. Board of Executors*, 3 Buch. 78; 9 S. C. 98.

²¹ Inst. 2: 20: 2; Voet, 43: 3.

²² Voet, 6: 1: 28.

²³ Voet, 30: 39; G. 2: 9: 6; V. D. L. 145.

in the peculiar position of the heir under the Roman law, it is submitted that it no longer obtains under our system of administration of the estates of deceased persons. The real position in such a case is that the ownership in every portion of the deceased's estate is vested in his executor, whether testamentary or dative, but that the legatee will be entitled, after the debts of the estate have been paid in full, to a real action (*vindicatio*) for the recovery of the thing bequeathed, if not already sold by the executor for good and sufficient reason. The alienation by the executor of the subject-matter of a bequest, though voidable, is not necessarily void, for circumstances may exist which may justify, or at any rate excuse, such alienation.²⁴ But as against a third party who has not derived his title through the executor, the legatee's right to claim the thing bequeathed is absolute.

A legacy which has been made conditional upon the legatee doing something cannot be claimed until the condition has been fulfilled. Where, therefore, landed property has been bequeathed subject to the condition that the legatee is to make certain payments to third parties, transfer cannot be claimed until the payments have been actually made.²⁵

As to the actual acquisition of legacies, it must be premised that legacies can only be claimed after the debts of the testator have been paid in full.²⁶

The duty of carrying out or fulfilling a legacy falls, as a general rule, upon the executor of the testator, but it may by the express direction of the testator be imposed specifically upon the heir or some other person

²⁴ *Lange v. Liesching*, Foord, 55; *Ferreira v. Otto*, 3 S. C. 193. See also *In re Widow Laubscher*, 1 Menzies, 374. But see the judgment

of Cloete, J., in *Anstruther v. Chiappini's Trustee*, 3 Searle, 98.

²⁵ *Ex parte Weyers*, 21 S. C. 82.

²⁶ Voet, 20: 2: 21.

benefited under the will, or even upon a donee *mortis causâ*.²⁷ For even under the Roman law, though the *dominium* of property bequeathed passed direct from the testator to the legatee, the possession of it did not so pass until it had been delivered by the person, upon whom the duty of doing so had been imposed, and had been accepted by the legatee.²⁸ The importance of such acceptance consists in the fact that it subjects the legatee to all the burdens usually attaching to the property bequeathed or specifically attached to the bequest by the testator.²⁹

A legacy must be either accepted or repudiated, and the Court may, upon sufficient cause shown, order a legatee to make his election.³⁰ When once a legacy has been accepted it cannot afterwards be repudiated, nor can it be accepted when once it has been repudiated.³¹

Repudiation must be made within a reasonable time.³² It can, however, only be made after the right to the legacy has actually vested; and consequently, if made before such vesting, it is void, unless made by way of agreement or compromise.³³ The repudiation may be either express or tacit and implied; but, where a person has both been instituted heir and had a legacy bequeathed to him, he is not understood as having repudiated the legacy from the mere fact that he has repudiated the inheritance.³⁴ Repudiation takes place tacitly when the legatee, after the death of the testator and after the right to the legacy has vested, buys the thing bequeathed to him with full knowledge of the

²⁷ Voet, 30: 1, 11, 13-16.

²⁸ Voet, 30: 1, 37.

²⁹ Voet, 30: 37; *Theunissen v. Theunissen*, 1 Roscoe, 107.

³⁰ *Strauss' Executor v. Strauss*, 16 S. C. 441.

³¹ Voet, 34: 4: 10; *Theunissen v. Theunissen*, 1 Roscoe, 107.

³² Voet, 34: 4: 10.

³³ *Ibid.*, secs. 10, 11.

³⁴ Voet, 34: 4: 10.

bequest; but not where he buys it in ignorance of the bequest.³⁵

Delivery of the property bequeathed will have to be made within a reasonable time, unless there be a clear indication of an intention on the testator's part postponing the payment.³⁶ And when there is unavoidable delay in the fulfilment of the legacy, or when the legacy has been left conditionally or is only payable at a future date, application may be made to the Court, which will, in its discretion, grant an order compelling the heir or other person burdened with the legacy to give security for the fulfilment thereof,³⁷ and this duty to give security cannot be remitted by the testator.³⁸ But parents cannot be compelled to give security to children, nor brothers and sisters to each other.³⁹

Where the subject-matter of the legacy is immovable property, the fideicommissary legatee may have his interest in the fideicommissary property registered in the office of the Registrar of Deeds.⁴⁰

By acceptance of the legacy, the legatee will, in the case of a legacy of a specific thing, be entitled to claim the property bequeathed to him by a real action (*rei vindicatio*), not only from the executor or the person specifically burdened with the legacy, but from any person whomsoever who may be in possession of the property.⁴¹ Such action, however, will not lie with respect to property which had not become vested

³⁵ Voet, 34: 4: 10, sec. 11.

³⁶ *Botha v. Botha's Executors*, 7 S. C. 319.

³⁷ Voet, 36: 3: 1, 2, 4.

³⁸ Voet, 36: 3: 6.

³⁹ *Ibid.*; Groen., Note b to G. 2: 20: 13.

⁴⁰ Act 5, 1884, sec. 19, sub.-sec. 12;

Act 15, 1855, schedule 1, sec. K; *Lange v. Liesching*, Foord, 58.

⁴¹ *Booyesen v. Colonial Orphan Chamber*, Foord, 51; *Haupt v. Van der Heever's Executor*, 6 S. C. 51; *Van Rooyen v. Gorman*, 6 S. C. 55; Voet, 30: 39, 46; G. 2: 23: 18; V. D. L. 124, 147.

in the testator before his death, and therefore not with respect to immovable property, of which he was entitled to claim transfer, but which had not actually been transferred to him before he died.⁴² Nor will it lie with respect to immovable property which is the subject of a fideicommissary legacy, and which has been sold by the executor of the testator, if the purchaser was not aware of the fideicommissum, and if the fideicommissary legatee, being of full age and aware of the sale, did not protest against it.⁴³ It would be different if the purchaser was aware of the fideicommissum.⁴⁴

The legatee will further be entitled, in security for the due payment of his legacy, to a tacit hypothec over all property in the possession of the heir or other person specifically burdened with the payment of the legacy, which has been derived by him from the testator either by will or by succession *ab intestato*, but not over property which has not been so derived.⁴⁵ This hypothec will secure not only the subject-matter or principal of the legacy, but also all accessions thereto, such as alluvion, interest, and fruits.⁴⁶ It may, however, be remitted by the testator.⁴⁷

The legatee may sue for the delivery of the property bequeathed not only by the *rei vindicatio* and the hypothecary action based upon his tacit

⁴² *Booyesen and another v. Colonial Orphan Chamber*, Foord, 48.

⁴³ *Lange v. Liesching*, Foord, 55, 63; *Williams v. Williams*, 13 S. C. 200.

⁴⁴ *Lange v. Scheepers*, 8 Buch. 92.

⁴⁵ *Gnade v. Executors of Piton*, 2 Menzies, 428; *Booyesen v. Colonial Orphan Chamber*, Foord, 51; *Brink's Curator v. Brink's Trustee*, 5 Searle, 336; *Oosthuysen's Tutrix v. Moffat*,

5 S. C. 319; *Jennings v. Van Wyk*, 7 S. C. 228; *Van Rooyen v. McColl and others*, 3 S. C. 284; Voet, 20: 2: 21, 22; 30: 40-42; G. 2: 23: 19; Schorer, Note 165; V. D. L. 147. See also *Minaar's Creditors v. Executor and Guardian of Neethling*, 3 Menzies, 71.

⁴⁶ Voet, 30: 43, 48.

⁴⁷ Voet, 30: 40, 41; V. D. L. 146.

hypothec, but also by a personal action, which will lie only against the executor or the person specially burdened with the legacy.⁴⁸ Where several persons are jointly so burdened, the insolvency of one will not prejudice the rest, unless an indivisible thing has been bequeathed, in which case each may be sued *in solidum*, but will have his recourse against the rest.⁴⁹

A legatee is entitled to specific performance, and consequently is not bound to accept money in place of goods or *vice versâ*, unless the option of giving one or the other has been left to the heir or other burdened person.⁵⁰

If the property bequeathed has since the vesting of the legacy perished through the negligence of the person burdened therewith, the value thereof will, as a general rule, have to be paid to the legatee.⁵¹

With respect to the liability for such negligence, Voet draws a distinction between the case of the heir and that of the legatee or particular fiduciary being the person burdened with the legacy. The heir, he says, is liable for all negligence, even the slightest; but the legatee or particular fiduciary, if he has received nothing under the will of the testator but what he has to hand over, is liable only for fraud (*dolus malus*), but if he has received more he is liable also for slight negligence.⁵² Seeing, however, that at the present day an heir is nothing more than a residuary legatee, it is doubtful whether this distinction will hold any longer.

The heir or other person burdened will, of course,

⁴⁸ *Booyesen v. Colonial Orphan Chamber*, Foord, 51; Voet, 30: 38, 39, 41; V. D. L. 124.

⁴⁹ Voet, 30: 46.

⁵⁰ Voet, 30: 49.

⁵¹ *Ibid.*

⁵² Voet, 30: 50 *et seq.*

not be liable for any loss or damage due to accident or the act of a third person.⁵³

The legatee will be entitled to claim the property as it was at the date of the testator's death, whether it has been increased or diminished in value since the making of the will,⁵⁴ and will consequently be entitled to all improvements made in the property since the date of the bequest,⁵⁵ and also the natural fruits which have accrued from it since the vesting of the legacy. As regards a pecuniary legacy, he will be entitled to interest not necessarily from the date of the vesting of the legacy, but from the time when, under the circumstances of the estate, it was right and proper that the legacy should have been paid.⁵⁶

Where a usufruct has been bequeathed subject to a condition or from a certain time, the fruits and profits will, pending the fulfilment of the condition or the arrival of the time, go to the testator's estate or to the person to whom the ownership of the property has been left, and the same will be the case during any lapse in the usufruct.⁵⁷

Where the estate of the testator is insufficient to satisfy all the legacies in full, all the legacies will have to abate or be reduced proportionately, unless the wording of the will shows a clear intention of the testator to the contrary;⁵⁸ and the same is the case where the testator has by mistake bequeathed property which does not belong to him.⁵⁹

If the property bequeathed is found to have a

⁵³ Voet, 30: 52, 54; G. 2: 22: 14, 20.

⁵⁴ Voet, 7: 1: 15.

⁵⁵ *Rathfelder v. Rathfelder*, 4 Buch. 9; G. 2: 22: 13, 20.

⁵⁶ *Trustees of Wright v. Wright's Executors*, 3 Buch. 95.

⁵⁷ Voet, 7: 1: 5.

⁵⁸ *Mulder v. Mulder's Executors*, 4 S. C. 39; *Christie v. Gilbert's Executors*, 5 S. C. 199; *Moodie's Executors v. Moodie's Heirs*, 9 S. C. 230.

⁵⁹ Voet, 10: 2: 1.

burden of some kind upon it, it becomes a question of importance whether the legatee is bound to accept the property burdened as it is, or whether it will be the duty of the executor or the person specially burdened with the legacy to release the property from the burden and to deliver it to the legatee free and unencumbered. A distinction is drawn by some writers between burdens which may endanger the ownership of the property and those which can have no such effect; and it is laid down by them that in the former case the duty of freeing the property will, as a general rule, fall upon the estate or person burdened with the bequest, but that in the latter the legatee will take the property burdened as it is.⁶⁰ The real test, however, is what was the intention of the testator, judging from the nature of the property and from the terms of the will. In the case of a mortgage, for instance, which is one of those burdens which are calculated to endanger the ownership of the property, the duty of discharging the mortgage falls upon the estate, if the testator was aware of the existence of the mortgage,⁶¹ but not if he was ignorant of it,⁶² nor if it appears from the terms of the will, either express or implied, that the property was bequeathed to the legatee burdened with the mortgage.⁶³ On the other hand, where the burden is one of those which are generally regarded as forming part of the property, such as a servitude or an irredeemable or purely real rent-charge, the testator will be presumed to have treated it from that point of view, and to have bequeathed the property together with its

⁶⁰ Voet, 30 : 27 ; G. 2 : 22 : 16 ; Buch. 9 ; G. 2 : 22 : 16.

V. D. K., Th. 325 ; Schorer, Note
156.

⁶² Voet, 30 : 27.

⁶¹ *Rathfelder v. Rathfelder*, 4

⁶³ Groen., De Leg., C. 6 : 42 : 6 ;
Voet, 30 : 27.

burden.⁶⁴ Thus, where a right to occupy a house and grounds has been bequeathed, the legatee will be liable for all charges, such as the municipal tenant's rate or water rate, to which an occupier is liable; but charges, such as the Divisional Council rates and municipal owner's rates, for which the owner is liable, will have to be borne by the estate of the testator.⁶⁵ A servitude which has not yet been legally imposed, but merely promised, will not be binding upon a legatee, though an agreement to impose a servitude upon a particular property will be binding upon the testator's estate and upon any heir to whom such property afterwards goes as part of his inheritance.⁶⁶

Where there are several co-legatees and one of them fails, the question arises as to what is to become of the share in the legacy of the legatee so failing—whether it is to go to his co-legatees by what is called in Roman law the *jus accrescendi*,⁶⁷ or whether it is to fall back into the testator's estate. The correct view is that it is merely a question as to what was the intention, either express or implied, of the testator.⁶⁸ The *jus accrescendi* will not, therefore, obtain where it is clear from the will that such was not the intention of the testator.⁶⁹ Some difficulty may arise sometimes from the mode in which the legatees are associated together in the bequest. They may be joined together in one or other of three ways, namely, (1) as regards the thing bequeathed alone (*re tantum*); (2) both as

⁶⁴ Voet, 30: 27; Schorer, Note 156; V. D. K., Th. 325; 3 Holl. Cons., part 2, cons. 190.

⁶⁵ *Crosbie v. Crosbie's Executor and another*, 21 S. C. 597.

⁶⁶ Voet, 8: 1: 6. As to eviction in the case of property bequeathed, see Voet, 21: 2: 12.

⁶⁷ For the *jus accrescendi* in the case of a joint usufruct, see Voet, 7: 2.

⁶⁸ *Potgieter v. Executors of Van der Heever*, 11 S. C. 40; Voet, 30: 59, 64; G. 2: 23: 5; V. D. K., Th. 326; Schorer, Note 163.

⁶⁹ Voet, 30: 59.

regards the thing bequeathed and by the wording of the will (*re et verbis*); or (3) by the words of the will only (*verbis tantum*).⁷⁰ In the first case, *e.g.*, where the testator in one part of his will bequeaths a certain article to A and in another part to B, without any indication of a desire to give each a separate share only, the presumption is irrebuttable that the testator intended that upon the death of one of the legatees the survivor is to take the whole of the property bequeathed.⁷¹ In the second case, *e.g.*, where an article has been bequeathed simply to A and B without any further indication of intention as to shares, upon the death of one of them the survivor will take the whole.⁷² In the third case, *e.g.*, where the testator has bequeathed an article to A and B in equal shares, there will be no right of accrual or *jus accrescendi*.⁷³ The *jus accrescendi* ceases when a legacy has once vested,⁷⁴ except in the case of the legacy of a usufruct to several co-usufructuaries.⁷⁵

CHAPTER XXVIII.

THE FAILURE OF LEGACIES.

A LEGACY may fail in one or other of three ways, namely, (1) it may be invalid *ab initio*; (2) it may become so afterwards, but before the death of the

⁷⁰ Voet, 30: 60-64.

⁷¹ *Steenkamp v. De Villiers*, 10 S. C. 61; Voet, 30: 60, 62.

⁷² *Watson v. Burchell*, 9 S. C. 2; *Steenkamp v. De Villiers*, 10 S. C. 61; Voet, 30: 60, 62.

⁷³ *Steenkamp v. De Villiers*, 10

S. C. 61; *Potgieter v. Executor of Van der Heever*, 11 S. C. 40; *Mijiet's Executors and another v. Ava*, 14 S. C. 511; Voet, 30: 61; 34: 1: 4.

⁷⁴ Voet, 7: 2: 4.

⁷⁵ Voet, 7: 2.

testator; or (3) it may fail after the death of the testator.¹

A legacy is invalid *ab initio*, if left to one who was dead at the time of the execution of the will,² or who was either altogether incompetent to take under any will or incompetent to take under the particular will in which the legacy in question is left to him or her, *e.g.*, by reason of the legatee or of his or her wife or husband having been a witness to such will,³ or by reason of the legatee or a relation of such legatee having written the will.⁴

A legacy which was valid at first will lapse or become invalid afterwards:

(1) If the legatee dies before the testator or before the vesting of the legacy, *e.g.*, before the fulfilment of the condition attaching to the legacy.⁵

(2) Failure of the condition attaching to the legacy.⁶

(3) If the legatee acquires the thing bequeathed during the lifetime of the testator from some other source by a gratuitous title or without valuable consideration, such as by gift *inter vivos* or as heir or legatee under the will of some other person.⁷

(4) If the property bequeathed perishes or suffers *specificatio*.⁸

The testator is, of course, always at liberty to revoke a legacy, either wholly or in part, and such revocation may be either express or tacit.⁹ It takes place tacitly if the testator subsequently bequeaths or

¹ Voet, 34: 8: 1.

² Voet, 34: 8: 2; G. 2: 24: 22.

³ Act 22, 1876, sec. 4.

⁴ Voet, 34: 8: 3, 4.

⁵ Voet, 34: 4: 9; 34: 8: 2; 36: 2: 1; *Marais v. Leibrandt*, 1 Roscoe, 231; G. 2: 24: 29; Schorer, Note

178.

⁶ Voet, 34: 4: 9; G. 2: 23: 8, 9.

⁷ *Ibid.*

⁸ Voet, 30: 55.

⁹ Voet, 34: 4: 1-3, 5; G. 2: 24: 26,

makes a donation of the same property either wholly or in part to another,¹⁰ or destroys it or alters it in such a manner that it can no longer be regarded as the same thing.¹¹ An intention to revoke is also presumed from a voluntary alienation of the property bequeathed by the testator,¹² and the revocation will hold good even though the intended alienation may, as in the case of a donation between husband and wife, be null and void as a matter of law; nor will the legacy be revived if the testator afterwards again acquires the property so voluntarily alienated by him.¹³ Where property has been bequeathed with the condition attached that, if the testator should sell the ground bequeathed and buy other ground in substitution for it, such other ground will have to be looked upon as bequeathed upon the same conditions as the original bequest, it has been held that, where a sale and purchase has actually taken place, in order to make the new ground bought subject to the legacy, it must be proved that it was actually bought with the object of such substitution.¹⁴

The same presumption arises from the fact of the testator having enforced payment of a debt which, or a release from which, has been bequeathed by him.¹⁵

A legacy is also tacitly revoked whenever the testator in his lifetime makes a donation of the property bequeathed to the legatee; but, if he gives only part of it, the legacy will remain good as to the remainder.¹⁶

Revocation is also inferred from the fact that a mortal enmity has sprung up between the testator and

¹⁰ Voet, 30: 1; 34: 4: 7; G. 2: 26: 24, 26.

¹¹ Voet, 30: 55; 34: 4: 2, 6.

¹² Voet, 30: 52; 34: 4: 2, 6; G. 2: 24: 28; *Steyn v. Steyn and others*, 21 S. C. 528.

¹³ Voet, 34: 4: 6, 7.

¹⁴ *Steyn v. Steyn and others*, 21 S. C. 538.

¹⁵ Voet, 30: 22, 23; 34: 4: 5.

¹⁶ Voet, 34: 4: 6.

the legatee, unless a reconciliation has taken place before the testator's death.¹⁷

It should, however, be noted that, where a fideicommissary legacy has been imposed upon a legatee, the fideicommissum is not revoked by the revocation of the legacy as regards the fiduciary, for the fideicommissary will still be entitled to claim the legacy.¹⁸

After the death of the testator a legacy may be lost by renunciation made by the legatee, or by a prescription of thirty years calculated from the time that the legacy became claimable by the legatee.¹⁹

CHAPTER XXIX.

PRÆLEGACIES.

ONE kind of legacy remains to be separately considered, namely, *prælegacies*.

A prælegacy is a legacy left to one of the heirs and which has to be paid out to him before any division of the estate.¹ In such a case it will be open to the heir to repudiate the inheritance and yet claim the *prælegacy*.²

A prælegacy is not subject to collation.³

Whether it is to be regarded as forming part of a fideicommissary inheritance left in the same will to the prælegatee or not, will depend upon whether such was or was not the intention of the testator, which intention will have to be gathered from the general context of the will.⁴

¹⁷ Voet, 34 : 4 : 5.

¹⁸ Voet, 34 : 4 : 12.

¹⁹ Voet, 33 : 1 : 1 *in fine*.

¹ Lybrecht, deel 1, chapter 24, sec. 1; Voet, 10 : 2 : 8.

² Lybrecht, deel 1, chapter 24,

sec. 2.

³ *Meyer v. Estate of Meyer*, 19 S. C. 227. Lybrecht, deel 1, chapter 24, sec. 3.

⁴ Voet, 36 : 1 : 37; 30 : 7. But see Lybrecht, deel 1, ch. 24, sec. 5.

CHAPTER XXX.

THE INTERPRETATION OF WILLS.

IN interpreting or construing a will the object to be aimed at should always be to give effect to the intention of the testator, in so far as this can be done consistently with the rules of law, not conjecturing but expounding the testator's will in so far as it can be ascertained from the words used by him. If the testator's intention be clear and the words used be sufficient to give effect to it, we should construe the words so as to give effect to that intention.¹

The testator's language should be taken in its ordinary grammatical sense, unless it is clear from the context that he intended to use it in a different sense.² In accordance with this proviso conjunctive words are sometimes construed as disjunctive and disjunctive words as conjunctive.³ The term "children," again, is often used in other than its ordinary sense, so as to include grandchildren and further descendants,⁴ though as a general rule it must be taken to refer to descendants of the first degree only, unless it can be gathered from the context that the testator intended to include more remote descendants also.⁵ The meaning to be attached to the word in any particular case is a

¹ *Hofmeyer v. De Wet*, 1 Buch. 337; *Lane v. Earl of Stanhope*, 6 Term Reports, 352.

² *De Jager v. De Jager*, 1 Buch. App. C. 440; *Lane v. Earl of Stanhope*, 6 Term Reports, 352; *Hofmeyer v. De Wet*, 1 Buch. 337; *per* Menzies, J., in *Caffin et Uxor v. Heurtley's Executors*, 1 Menzies, 178; Voet, 28: 7: 30; 34: 5: 4; 36: 1: 25; V. D. L. 143; *In re Strydom*, 5 Juta, 117; *In re McInerney*, 9 S. C. 43.

³ Voet, 28: 7: 29.

⁴ *In re Beck*, 1 Menzies, 332; *In re Bergh*, 7 Juta, 308; *Spengler v. Executors of Higgs*, 1 Roscoe, 21; V. D. K., Th. 304; V. L., vol. 1, pp. 364, 382 *et seqq.* For the meaning of the Dutch words "Kleinkinderen" and "Kindsinderen," see 1 Buch. App. C. 438; *Vermaak and another v. Vermaak*, 21 S. C. 470.

⁵ *Galliers and others v. Rycroft*, 17 S. C. 569.

question not of law, but of fact, namely, what was the intention of the testator in using it,⁶ and the intention will have to be gathered from the will itself and the surrounding circumstances.⁷ With regard to collaterals, the presumption, in case of doubt, is against the construction which would include grandchildren among "children," but this presumption may be rebutted by indications of an intention to the contrary;⁸ but in the case of a bequest to the testator's own "children" the Courts will require much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of any one else.⁹ Where the term "children" is used in the condition to a fideicommissum, *e.g.*, "provided the fiduciary dies without children," it would seem that the term is restricted to legitimate children, whether the fiduciary be a male or a female.¹⁰

The term "our children" is also a flexible term when used in the mutual will of two spouses. In the case of *Russouw's Executors v. Russouw's Executor*,¹¹ for instance, where the testators had no children by their marriage, but each had children by a former marriage, it was held that the term "all our children" used in their mutual will applied to all the children of the former marriages, giving them the property bequeathed in equal shares. In the case of *Du Preez v. Du Preez*,¹² again, where the testators had children by their

⁶ *In re Beck*, 1 Menzies, 332; *Pretorius v. Executors of Pretorius*, 2 S. C. 293; *Spengler v. Executors of Higgs*, 1 Roscoe, 227; *In re Bergh*, 7 S. C. 308; Voet, 36: 1: 22-24.

⁷ *Pretorius v. Executors of Pretorius*, 2 S. C. 293; *Bresler v. Kotze's Executors*, 2 Menzies, 449; Voet, 36: 1: 22, 24; *Meyer v. Meyer's Executors*, 12 S. C. 135; *Estate of Lewis v.*

Estate of Jackson, 22 S. C. 73.

⁸ *De Villiers v. Stiglingh's Executor*, 14 S. C. 388.

⁹ *Galliers and others v. Rycroft*, 17 S. C. 575.

¹⁰ Voet, 36: 1: 13, 16.

¹¹ *Russouw's Executors v. Russouw's Executor*, 11 S. C. 283.

¹² *Du Meez v. Du Preez*, 1 S. C. 259.

marriage and each had also children by a former marriage, it was held that the term "our children" referred to the children of the three marriages.

But where a mutual will provided that after the death of the survivor certain landed property belonging to the testators was to be sold "among the heirs," among whom the proceeds of the sale was to be divided, it was held that the heirs referred to were the heirs of the testator and testatrix *jointly*, and did not include children of the survivor by a second marriage.¹³

Where a fideicommissum is subject to the condition that the fiduciary die without children, and the fiduciary is a woman, the term "children" will not, as a general rule, include illegitimate children, unless there is evidence of an express or implied intention of the testator to that effect.¹⁴

The condition "if he die without children" is presumed in certain cases when it has not been expressed, that is to say, whenever a descendant has been burdened with a fideicommissum in favour of a third party. Such a fideicommissum will fail if the fiduciary descendant leaves children surviving him. This rule, however, does not apply to the case of an ordinary or simple substitution to a descendant.¹⁵

Where a testator had instituted his children and grandchildren as his heirs, it was decided that, in the absence of any indication of an intention to the contrary, only those grandchildren whose parents had predeceased the testator were to be deemed to be included under the term "grandchildren."¹⁶

¹³ *Smit v. Volk*, 17 S. C. 195.

¹⁴ *In re Russo*, 13 S. C. 185; Schorer, Note 141.

¹⁵ *Galliers and others v. Rycroft*,

17 S. C. 569.

¹⁶ *Human v. Human's Executors*, 10 S. C. 172; Voet, 28 : 5 : 17; V. L., vol. 1, p. 384.

The term "legal heir" has been interpreted to mean the heir *ab intestato* or by operation of law,¹⁷ and the term "lawful issue" has been held limited to lawful issue by representation *per stirpes*.¹⁸

Under an institution of the testator's "brothers and sisters and their children," or of "all relations," the persons mentioned are to be presumed as intended to succeed according to their order of succession *ab intestato*.¹⁹

The term "successors *ab intestato*" means the successors *ab intestato* according to the law of the testator's domicile.²⁰

The term "next-of-kin" means the same thing as "successors *ab intestato*."²¹

In the case of a fideicommissum left simply in favour of "a family," the members of the family will have to be called to the fideicommissary inheritance in accordance with the order of succession *ab intestato*.²²

The use of the term "wife" may also cause doubt, where the testator has had more than one wife. It may be laid down as a general rule that, if the testator executed his will when he was still a bachelor, the term "wife" refers to the wife who survives him; and the same is the case where the testator has in general terms bequeathed "maintenance" to his wife.²³ But where the testator was married at the time he made his will the term "wife," if used without indicating any particular individual by name or description, is

¹⁷ *Wilmot v. Thomas's Executor*, 15 E. D. C. 21.

¹⁸ *Board v. Titterton*, 13 S. C. 164. As to the term "descendants," see *Nieuwoudt v. Registrar of Deeds*, 14 S. C. 244.

¹⁹ *Re Mutery's Will*, 5 S. C. 39; *Human v. Human's Executors*, 10 S. C. 172; Voet, 28: 5: 20.

²⁰ Voet, 36: 1: 25; G. 2: 18: 22; Schorer, Note 137.

²¹ Voet, 36: 1: 25, 35: 1: 8 *in fine*; 28: 5: 19; G. 2: 18: 22; Schorer, Note 137; V. L., vol. 1, pp. 384, 385.

²² Voet, 36: 1: 30.

²³ Voet, 25: 5: 14.

held to apply to the wife who was alive at the time of the execution of the will, and not to any subsequent wife.²⁴ It would be otherwise where from the context it is clear that a particular wife was referred to. Thus where the testator had bequeathed a farm to a grandson subject to the following *fideicommissum*: "Upon the understanding that he shall not be able to sell the farm, but that, after his death, *and that of his wife*, it shall devolve upon his eldest son," and the grandson in question had several wives, it was held that the wife referred to was the one who was the mother of the eldest son of such grandson and not the surviving wife.²⁵

Technical words and phrases will have to be construed according to their established technical meaning, notwithstanding any averment or suggestion, however strong, proposed to be proved by extrinsic evidence, that the testator intended to use them in a different sense.²⁶

Extrinsic evidence is not, as a rule, admissible to explain what was the intention of the testator at the time he executed the will;²⁷ but the Court may look at all the material facts relating to the persons and

²⁴ Voet, 28: 5: 14. For a definition or interpretation of some other special terms, reference may be had to Voet, e.g., "wine" (Voet, 33: 6: 2), "farming implements and tools" (Voet, 33: 7: 1, 2), "household furniture" (Voet, 33: 10), "maintenance" and "food" (Voet, 34: 1), "gold and silver," "wrought and unwrought gold and silver," "clothing" (Voet, 34: 2: 1, 3, 4, 9, 10), "the testator's gold or clothes" or "wine" (Voet, 34: 2: 2, 11; 33: 6: 3), "ornaments" (Voet, 34: 2: 6), &c. See also G. 2: 22: 22-28. In the case of *Collins v. Executors of Hartog* (1 Roscoe, 20), a bequest of

"all the testator's household furniture and all other movable property" which should be found in a certain house, was held to include watches and other articles deposited there for sale. (See also Voet, 33: 7: 4; V. D. L. 143, 145; V. L., vol. 1, pp. 394 *et seqq.*)

²⁵ *Kruger v. Kruger*, 22 S. C. 217.

²⁶ *Per* Menzies, J., in *Caffin et Uxor v. Heurtilley's Executors*, 1 Menzies, 178; *Lane v. Earl of Stanhope*, 6 Term Reports, 352; *Hofmeyer v. De Wet*, 1 Buch. 337; *De Jager v. De Jager*, 1 Buch. App. C. 440.

²⁷ Voet, 33: 10: 3; 34: 2: 3; 36: 1: 25; D. 32: 25: 1.

property mentioned in the will, and to the circumstances of and surrounding the testator and his family.²⁸ Extrinsic evidence may, however, be used whenever there is any patent ambiguity in the wording of a will.²⁹

When words or expressions in a will are ambiguous, obscure, or uncertain in themselves, or are rendered so by reason of some other word or expression used in the will with reference thereto, an attempt should first be made to explain the ambiguity, obscurity, or uncertainty by reference to the context, the intention of the testator being sought from the general terms of the instrument.³⁰

If a sufficient explanation cannot be gathered from the context or the general tenor of the instrument, evidence extrinsic of the will is admissible to explain or remove the ambiguity, obscurity, or uncertainty;³¹ and, upon failure of such evidence, the will or the particular clause thereof will be null and void and of no effect.³²

Extrinsic evidence is also admissible sometimes where, though the words of the will are clear and unambiguous in themselves, they are rendered ambiguous by some circumstance outside of the will. Where, for instance, the name or description of a person or thing used in a will is equally applicable to more than one person or thing, extrinsic evidence is

²⁸ Voet, 34: 5: 4; *Collins v. Executors of Hartog*, 1 Roscoe, 29; *In re Herold*, 1 S. C. 165, 167; *per* Menzies, J., in *Caffin et Uxor v. Heurtley's Executors*, 1 Menzies, 178.

²⁹ *Caffin et Uxor v. Heurtley's Executors*, 1 Menzies, 179; *De Smidt v. Burton*, 1 Menzies, 225; *Johnson v. Executors of Roux*, 4 Buch. 34; *In re McInerney*, 9 Buch. 43; *Lint v. Zipp*, 6 Buch. 181; *In re Jeffreys*,

12 S. C. 340; Voet, 33: 10: 3; 34: 2: 3; 36: 1: 25; D. 32: 25: 1.

³⁰ *Batt v. Widow Batt*, 2 Menzies, 408.

³¹ *Hofmeyer v. De Wet*, 1 Buch. 387; *Re Du Preen's Will*, (1904) T. S. 826.

³² *Per* Menzies, J., in *Caffin et Uxor v. Heurtley's Executors*, 1 Menzies, 178; Voet, 34: 5: 4.

admissible to show to which person or thing the name or description was intended to apply;³³ and, upon failure of such evidence, the particular part of the will having reference to such person or thing will be void.³⁴

The will must be looked at as a whole, and the entire scope of it, as it affects each provision of it, will have to be considered,³⁵ effect being given to every word, provided an effect can be given to it not inconsistent with the general intent of the testator, and conflicting provisions being reconciled and adjusted so as to remove the conflict as far as possible, and to arrive at one uniform and consistent whole.³⁶ Of course, if two provisions are directly in conflict, they will both of them be void.³⁷

Where there are several testamentary writings, they will all of them have to be construed together.³⁸

A will must be favourably and benignly interpreted so as to carry out the intention of the testator as far as possible, and in case of doubt that construction should always be adopted which will give effect to such intention rather than that which would nullify it.³⁹

A doubt may sometimes arise as to whether a usufruct merely or full ownership or a fideicommissum has been bequeathed, in which case the intention of the testator will have to be ascertained by applying the general rules of interpretation here laid down.⁴⁰

In the construction of fideicommissa, as of all other

³³ Voet, 34: 5: 1, 4; *In re Herold*, 1 S. C. 181.

³⁴ Voet, 35: 1: 8.

³⁵ *In re Strauss*, 11 S. C. 205; *Lucas v. Hoole*, 9 Buch. 142; *Batt v. Widow Batt*, 2 Menzies, 408; Voet, 28: 5: 13; 34: 5: 4.

³⁶ *De Jager v. De Jager*, 1 Buch. App. C. 440; *Weise v. Burger*, 5 Searle, 255; Voet, 28: 5: 13, 17, 18; 29: 7: 3; 34: 5: 4; 28: 3: 9.

³⁷ Voet, 34: 5: 4; 28: 3: 9.

³⁸ *Hofmeyer v. De Wet*, 1 Buch. 333; Voet, 28: 3: 8; 29: 7: 3.

³⁹ *Weise v. Burger*, 5 Searle, 255; *per Watermeyer, J.*, in *Dwyer v. O'Flynn's Executor*, 3 Searle, 32; Voet, 34: 5: 4; 28: 7: 30; V. D. L. 143.

⁴⁰ See also Voet, 7: 1: 9-12, 15, 17.

provisions of a will, the first object must always be to ascertain the intention of the testator.⁴¹ There are certain special rules, however, applying to them, and the principal of these is that in case of doubt all property is to be presumed to be free from burdens, and that, consequently, a fideicommissum is not to be readily presumed.⁴² When, therefore, there is any doubt as to the intention of the testator, that construction will have to be adopted which will give the property to the heir or legatee free from fideicommissum;⁴³ and, consequently, when there is any doubt as to whether a substitution is an ordinary or a fideicommissary substitution, the presumption is in favour of the former.⁴⁴ A fideicommissum must also be strictly interpreted, and in case of doubt that construction will have to be adopted which imposes the least burden upon the fiduciary.⁴⁵ It is upon the same principle that where it is doubtful whether a certain provision attached to an institution or bequest is a condition or a *modus*,⁴⁶ the presumption is in favour of its being a *modus* rather than a condition, because a disposition with a *modus* attached to it is regarded as unconditional, and therefore less burdensome.⁴⁷ The intention also to attach even a *modus* to a bequest must be clear and distinct, for in case of doubt a bequest will be regarded as free from such *modus*. Thus where husband and wife had

⁴¹ Voet, 36 : 1 : 38; G. 2 : 20 : 5.

⁴² Voet, 36 : 1 : 7, 27; *Lind v. Calitz*, 9 S. C. 268; *Du Plessis v. Smallberger*, 3 Searle, 383.

⁴³ *Cruse v. Executors of Pretorius*, 9 Buch. 124; *Lint v. Zipp*, 6 Buch. 181; *In re Carey*, 11 S. C. 123; *Du Plessis v. Smallberger*, 3 Searle, 383; *Olivier v. Olivier*, 3 Searle, 367; *Trustees of Jonker v. Executor of Jonker*, 1 Roscoe, 336; *Laing v. Laing's Executor*, 7 S. C. 85.

⁴⁴ Voet, 36 : 1 : 1, 28; 28 : 6 : 3, 15; *Lint v. Zipp*, 6 Buch. 181; *Van Wyk's Trustee v. Van Wyk and others*, 13 S. C. 489; *Van der Merwe v. Executors of Van der Merwe*, 21 S. C. 396.

⁴⁵ *Nel v. Nel's Executors*, 8 S. C. 192; *In re Wells*, 6 E. D. C. 171; Voet, 28 : 6 : 3, 15; 36 : 1 : 1, 27, 28, 72; G. 2 : 20 : 11.

⁴⁶ See p. 178, above.

⁴⁷ Voet, 35 : 1 : 14.

bequeathed certain land to their two sons, subject to a usufruct in favour of the survivor "in order that he or she may be better enabled to maintain and support and educate our children until they become of age or marry," and the survivor went insolvent, it was held that these words did not amount to a positive direction or command, but were merely an expression of desire, and that consequently the trustee of the insolvent estate was entitled to claim the usufruct for the benefit of the creditors, free from the burden of maintaining the children.⁴⁸

In the case of a prohibition to alienate out of the family, the prohibition does not extend beyond the fourth generation, unless such clearly appears to have been the intention of the testator.⁴⁹

But where a bequest of landed property was left to certain legatees, but with the proviso "but not to be sold out of the family," it was held that the restriction upon alienation was binding only upon the first legatees.⁵⁰

In conclusion, we may mention two forms of wills which have received a special interpretation by our Courts. Where husband and wife, married in community of property, have by mutual will instituted the survivor, together with the children, as heirs of the first-dying, the survivor to retain the joint estate during life, and after his or her death the joint estate to be divided amongst the children, the survivor will be a fiduciary as to his or her own half-share of the estate and a child's portion, and merely a usufructuary

⁴⁸ *Estate of Price v. Baker and Price*, 22 S. C. 321.

⁴⁹ Voet, 36: 1: 33; G. 2: 20: 11, and Groen., Note 22 thereon; Schorer, Note 144; Groen., De Leg., Novel, 159; V. L., C. F., part 1: 3: 7, n.

14; *Ryklief's Heirs v. Ryklief's Executors*, 13 S. C. 64; Sande on Restraints, Webber's Translation, p. 177.

⁵⁰ *In re Hodgkinson*, 14 E. D. C. 136.

as to the rest of the estate to which the children have been instituted heirs.⁵¹ Again, where a husband and wife, married in community of property, have executed a mutual will, instituting the survivor heir to the first-dying with the burden of maintaining and educating the children of the marriage, "until they become of age, marry, or arrive at some other approved station in life, at which time each of them shall have to be paid for, or in place of paternal or maternal portion, *such amount as the survivor shall conscientiously and according to the position of the estate find to be due*" (a form of will not unusual amongst the Dutch inhabitants of the Colony), it has been held that the children are entitled to their filial portions, the survivor being regarded as having been instituted jointly with the children, and therefore also entitled to a child's portion.⁵²

CHAPTER XXXI.

DONATIO MORTIS CAUSÂ.

THERE is one other subject which, though it does not, strictly speaking, come under succession, is still closely related to that of legacies; namely, donations made in contemplation of death or *mortis causâ*.¹ These may

⁵¹ *Lucas v. Hoole*, 9 Buch. 132; *Naudé v. Naudé's Executors*, 10 S. C. 145; *Williams v. Williams and others*, 12 S. C. 392.

⁵² *Oosthuysen and Du Toit v. Mocke*, 1 Roscoe, 330; Cape Argus

Report, Jan. 11, 1866; *Widow Cleeweek v. Bergh*, 2 Menzies, 396. But see *In re Wium*, 2 Menzies, 431.

¹ Voet, 39: 6: 1; G. 3: 2: 22; V. L., C. F., part 1: 4: 12: 24.

be made in one or other of three ways: (1) By the donor giving something in mere general contemplation of death, but without any fear of an early death or any imminent danger, upon the understanding that it is not to become the property of the donee until the donor's death;² (2) when the gift is made in fear of death from a present illness or from a particular imminent danger, with the understanding that it is not to become the property of the donee until the death of the donor from the particular illness or danger; or (3) where the donation is made in such special fear of death, but on the understanding that the *dominium* is to pass to the donee at once, but that the property is to be returned if the donor recovers or escapes from the particular illness or danger.³ The first two of these may be made either with or without delivery,⁴ but in the third there must be delivery, as ownership cannot pass without it.⁵

As a general rule, the same principles apply to donations *mortis causâ* as to legacies.⁶

It follows that whatever property may validly be bequeathed may also be given *mortis causâ*. The same persons also are competent both to make and receive such donations, and to leave and take legacies, and that both absolutely and relatively to each other.⁷ Hence, such a donation between husband and wife will be valid, though one made *inter vivos* between spouses be void.⁸

A married woman, again, may validly make a donation *mortis causâ* without the consent of her

² Voet, 39: 6: 3; 39: 5: 4; G. 2: 14: 2.

³ Voet, 39: 6: 3; G. 2: 14: 2; V. L., vol. 2, p. 236.

⁴ G. 3: 2: 22; V. L., C. F., part 1: 4: 12: 2.

⁵ Voet, 39: 6: 6; 6: 1: 21.

⁶ Voet, 39: 6: 4; G. 3: 2: 23.

⁷ Voet, 39: 6: 4, 5; V. D. K., Th. 493.

⁸ Voet, 39: 6: 5; V. L., C. F., part 1: 4: 12: 24.

husband, though she cannot make one *inter vivos* nor any other contract without such consent.⁹ So also a minor, if he has attained the age of puberty when he may competently make a will, may validly make such a donation without his guardian's consent, provided he makes no delivery and that the ownership does not pass at once, though he cannot make a donation *inter vivos* or any other alienation of property.¹⁰

There are, however, some exceptions to this rule. A legatee, for instance, must be competent to take the legacy both at the time of the execution of the will or codicil and at the death of the testator; whereas, in the case of a donee *mortis causâ*, such capacity need only exist at the date of the donor's death.¹¹ Again, in a donation *mortis causâ* the *dominium* does not pass without delivery, whereas in a legacy it passes *ipso jure* upon the death of the testator.¹² A donation *mortis causâ* of an annuity is considered as one gift, whereas a legacy of the same kind is regarded as consisting of several annual legacies.¹³

Donations *mortis causâ* require the same number of witnesses as a codicil; that is, they could formerly be executed in the presence of five witnesses or of a notary and two witnesses,¹⁴ but at the present day with us they require to be made in the presence of two witnesses or a notary and two witnesses.¹⁵ They are not completed without acceptance by the donee,¹⁶ which should take place before the death of the donor.¹⁷

⁹ Voet, 39: 6: 5; Schorer, Note 293.

¹⁰ Voet, 39: 6: 5; Schorer, Note 293. But see G. 3: 2: 23.

¹¹ Voet, 39: 6: 6.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ V. D. K., Th. 492; Voet, 39:

6: 4; *Melck, Executor of Burger, v. David*, 3 Menzies, 468; V. L., C. F., part 1: 4: 12: 24.

¹⁵ See pp. 123, 126, and 130, above.

¹⁶ Voet, 39: 6: 5.

¹⁷ *Clarke v. Executors of Castray and Beale*, 19 S. C. 501.

In case of doubt, a donation is presumed to be *inter vivos* rather than *mortis causâ*, even though at the time of the gift the donor may have been in actual fear of death.¹⁸ But when a testator has first bequeathed a thing to any one and afterwards makes a donation of the same thing to him, the gift must in case of doubt be presumed to be made *mortis causâ* rather than *inter vivos*, because the intention of the testator is presumed to be changed as little as possible, and the burden of proof as to the change of intention is upon him who asserts it.¹⁹

A donation *mortis causâ* does not vest in the donee absolutely until the death of the donor.²⁰

It follows that if a person has given several donations *mortis causâ* at different times in the course of his life, none of them will take precedence of the rest, but all will date equally from the donor's death. Consequently, if at that date his assets are not sufficient to meet his liabilities, all the donations will have to be reduced or abated *pro rata* in the same way as legacies would under similar circumstances.²¹ The *jus accrescendi* applies to co-donees *mortis causâ* in the same way and on the same principles as to co-legatees.²²

Donees *mortis causâ* are entitled to the same legal remedies as legatees.²³

A donation *mortis causâ* lapses, if the donee dies before the donor, even though the gift may have been completed by delivery.²⁴ It also lapses upon the recovery or escape of the donor from the

¹⁸ Voet, 39: 6: 1, 2; V. L., C. F., part 1: 4: 12: 25.

¹⁹ Voet, 30: 1.

²⁰ Voet, 39: 6: 3, 6; *Trustees of Brink v. Mehan and others*, 1 Roscoe, 212.

²¹ Voet, 39: 6: 4, 6, 7. And see

p. 189, above. *Trustees of Brink v. Mehan*, 1 Roscoe, 212.

²² Voet, 39: 6: 4; V. L., vol. 2, p. 237, Note c, and see p. 191, above.

²³ See p. 186, above.

²⁴ Voet, 39: 6: 7; G. 3: 2: 23; V. L., C. F., part 1: 4: 12: 24.

particular illness or danger in fear of which it was made.²⁵

It may also at any time be revoked by the donor, even though it has been completed by delivery.²⁶

Mere embodiment of the gift later on in a will which is subsequently found to be invalid, will not have the effect of a revocation.²⁷

When a donation has lapsed or been revoked, the donor is, of course, entitled to have the donation cancelled and to recover the property where there has been delivery. The remedies for attaining this end vary in the different forms of donation. If the donation is one made with delivery in one or other of the first two modes of granting donations *mortis causâ*,²⁸ the property may be recovered by a real action or *rei vindicatio* from the donee or any other possessor of the same. If it is made with delivery in fear of some special danger and with the understanding that the *dominium* is to pass to the donee at once, the donor will not be entitled to the *rei vindicatio*, but will have to proceed by way of a personal action against the donee for the recovery of the thing or its value. These rights of action are transmitted to the donor's heirs in case he dies before he has instituted them. Where there has been no delivery, the donation will be cancelled *ipso jure* without any action on the part of the donor.²⁹

²⁵ Voet, 39: 6: 3, 7; G. 3: 2: 23; V. L., C. F., part 1: 4: 12: 24.

²⁶ Voet, 39: 3: 3, 4, 7; Voet, 39: 5: 4; G. 3: 2: 23; 2: 14: 2; V. D. L. 216; V. L., C. F., part 1: 4: 12: 24.

²⁷ *Clarke v. Executors of Castray v. Beale*, 19 S. C. 501.

²⁸ See p. 205, above.

²⁹ Voet, 39: 6: 3.

CHAPTER XXXII.

SUCCESSION DUTY.

By Act 5 of 1864, Succession Duty is imposed on all successions¹ and donations *mortis causâ*,² the term "succession" being defined as being "every past or future disposition of property by reason whereof any person has or shall become entitled to any property not being immovable property out of this Colony, or the income thereof, or property situate in the United Kingdom of Great Britain and Ireland,³ upon the death of any person dying after the taking effect of this Act, either immediately or after an interval, either certainly or contingently, and either directly or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the taking effect of this Act, to any other person in possession on expectancy."⁴

The amount of the duty is 1 per cent. of the net value of the succession, where the successor is a lineal descendant or ascendant of the deceased, 2 per cent. where it is a brother or sister, 3 per cent. where it is a descendant of a brother and sister, and 5 per cent. if a more remote relation or a stranger.⁵

Where the total value of the successions derived from the deceased does not amount to £100, no duty is payable.⁶

A son or daughter of the deceased will not be

¹ Act 5, 1864, sec. 2.

² *Ibid.*, secs. 4, 11.

³ Act 4, 1895, sec. 1.

⁴ Act 5, 1864, sec. 1.

⁵ *Ibid.*, sec. 2, sub-sec. 1.

⁶ *Ibid.*, sec. 3, sub-sec. 1.

liable to the duty if the net amount or value of his or her succession does not amount to £100.⁷

No successor is liable to duty if the amount of his succession is less than £20.⁸

A surviving spouse who succeeds to his or her deceased spouse is wholly exempt from succession duty.⁹

The duty may be deducted by the executor, whether testamentary or dative, from the succession of every successor in the estate under his administration, and the obligation of so deducting it is imposed upon him by the Act; but if he should omit to do so, the successors themselves will remain ultimately liable.¹⁰

For the further details of the Act as to the valuation of successions, etc., reference must be had to the Act itself.

CHAPTER XXXIII.

EXECUTORS.

UNDER our common law, as pointed out above,¹ the administration of the estates of deceased persons was vested in their heirs. It became the practice, however, in the United Provinces, which practice was continued and followed in this Colony, to appoint one or more persons called *executors* by will, codicil, or some special deed, who were charged with the liquidation and distribution of the estate, and whose duty it was,

⁷ Act 5, 1864, sec. 3, sub-sec. 2.

⁸ *Ibid.*, sec. 3, sub-sec. 3.

⁹ *Ibid.*, sec. 3, sub-sec. 4.

¹⁰ *Ibid.*, sec. 8.

¹ Page 106, above.

after paying the debts of the deceased and the legacies left by him, to pay or hand over the net balance of the estate to the heirs or to the administrators, if any had been appointed by the testator.² But the administration of intestate estates still continued vested in the hands of the heirs *ab intestato*, unless such heirs were minors, in which case the estate was administered by the Orphan Chamber.³ Under this system the executors were in the position of procurators appointed by the testator to manage his funeral, to recover what was due to him, to pay his debts and legacies, and to administer his property until a division thereof could be effected, and of quasi-procurators to that extent of his heirs. In that capacity they administered the estate under the supervision and control of the heirs, could not alienate any property without their consent, and could not keep them out of the inheritance unless it had been so provided by the testator.⁴

This system was continued in this Colony until the whole law on the subject was systematized by Ordinance No. 104 of 1833, which provides that the estates of all persons dying either testate or intestate, in so far as the same are situate within this Colony, are to be administered and distributed under and by virtue of letters of administration granted by the Master of the Supreme Court to executors testamentary or dative.⁵ This, however, does not apply to the estate, property, or effects on board any vessel within

² V. D. L. 147; Lybrecht, vol. 1, ch. 30, secs. 3, 4; V. D. K., Th. 323; Voet, 28: 5: 12; *Eaton v. Registrar of Deeds*, 7 Juta, 251.

³ *Loedolff v. The Orphan Chamber*, 1 Menzies, 486.

⁴ V. D. K., Th. 323; Bynkershoek, Quæst. Jur. Priv., l. 3, c. 1; *per*

Watermeyer, J., in *Dwyer v. O'Flynn's Executor*, 3 Searle, 32; *Eaton v. Registrar of Deeds*, 7 Juta, 251; *Brink's Trustee v. Theron*, 4 Juta, 27; *In re Brown*, 7 Juta, 239.

⁵ Ord. 104, 1833, sec. 19; *Eaton v. Registrar of Deeds*, 7 S. C. 251.

the limits of this Colony or of the dependencies thereof, and belonging to one of the officers, crew, or passengers of such vessel who shall die on land within this Colony or on board such vessel being within the said limits, unless such person shall leave property situate on land within this Colony, not being wearing apparel, bedding, or other articles of a like nature, unless it shall be shown to the Supreme Court or a Judge thereof or to the Master, that for the due administration and distribution of such property it is necessary and expedient that it should.⁶ Nor does it apply to the estate, property, or effects (except immovable property situate within this Colony) of any member of His Majesty's Army, whether officer or otherwise, who shall die whilst employed on service in the Colony.⁷

The Court will not order the liquidation of an estate, unless it is proved that the owner thereof is dead. But under certain circumstances the death will, for the purposes of such liquidation, be presumed and the liquidation ordered, subject to due security being given to the Master for the restitution of any property received under the liquidation, in case the person who is presumed to be dead should afterwards turn out to be alive.⁸

If, before the granting of such letters of administration, any person takes upon himself to administer, distribute, or in any way dispose of any estate or part thereof, except in so far as may be absolutely necessary

⁶ Ord. 104, sec. 35.

⁷ *Ibid.*

⁸ *In re Booysen*, Foord, 187; *Re Kannemeyer*, 7 S. C. 322; *In re Lavin*, 3 E. D. C. 435; *In re Kannemeyer*, 16 S. C. 407; *In re Kirby*, 16 S. C. 245; *Ex parte Storey*, 3 Buch. E. D. C. 150; *In re Meyer*, 1 Roscoe, 285; *In re Miller*, 4 Buch.

28; *In re Nelson*, 6 Buch. 130; *In re Hawkins*, 1 Buch. 23; *Dormehl v. Morison's Executors and another*, 7 S. C. 152; *In re Pretorius*, 21 S. C. 21; *Rhodes v. Rhodes*, 36 L. R., Ch. D. 586; Voet, 10: 2: 18, 20; 23: 2: 99; 38: 17, Summary, sec. 16; 34: 5: 3; Schorer, Note 45.

for the safe custody or preservation thereof, or for providing a suitable funeral for the deceased, or for the subsistence of the family or household or live stock left by the deceased, such person shall be personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by the estate, and all legacies left by the deceased in so far as the assets of the estate may prove insufficient to pay the same, unless he can prove to the satisfaction of the Court the true amount and value of the property which has been unduly administered, distributed, or disposed of by him, and that such administration, distribution, or disposal was not fraudulent, in which case he will only be liable to that extent.⁹

CHAPTER XXXIV.

THE APPOINTMENT OF EXECUTORS.

EXECUTORS are of three kinds; namely, *Testamentary*, *Dative*, and *Assumed*. Besides these, there were formerly two other kinds of executors; namely, *Substituted* and *Surrogated* executors, but these are no longer known to our law.¹

Executors, though appointed in different ways, all receive their authority to act as such only from the letters of administration granted to them by the Master of the Supreme Court, without which they cannot act.²

⁹ Ord. 104, sec. 29.

¹ *In re Titterton*, 12 S. C. 1; *Stout v. Royal Insurance Co.*, 5 E. D. C. 37.

² *Stout v. Royal Insurance Co.*, 5

E. D. C. 37; *Muter and Stone v. Spangenberg*, 2 Menzies, 457; *Walker and others v. Norden*, 2 Menzies, 359.

And, as long as such letters of administration are in existence and unrevoked, the authority of an executor to act and sue as such cannot be questioned.³ Pending the issue of such letters of administration, the Master may, whenever such course is necessary or expedient, appoint a *curator bonis* to take custody and charge of the property in the meanwhile.⁴

A testamentary executor is one appointed by the will of a deceased person,⁵ to whom the Master will be obliged, upon application, to grant letters of administration as soon as the will of the deceased shall have been lodged in his office, unless it appears to the Master, or unless any one by writing lodged in his office objects, that the deed under which the applicant claims to be executor testamentary is not sufficient in law to warrant such claim, in which case the granting of the letters will have to be suspended until the validity and legal effect of the deed has been determined by the Court, or the objection which has been lodged withdrawn.⁶ Where two spouses married in community of property have appointed executors testamentary, but have directed that the survivor shall remain in possession of the joint estate during life, such executors will be entitled to share in the administration of the joint estate jointly with the executor, if any, appointed by the survivor in a subsequent will; though it is possible for spouses in their joint will to use such language and to deal with their common estate in such a manner as to prevent the survivor, after adiation, from appointing any other executor to administer the joint estate. The executor

³ *Mills v. Thwails*, 2 Searle, 187;
Quinn v. Pilkington, 11 S. C. 416.

⁴ Ord. 104, sec. 19; *In re Melass*,
 13 S. C. 97.

⁵ Ord. 104, sec. 19.

⁶ Ord. 104, sec. 20; *In re Hoets*,
 2 Menzies, 459.

appointed by the survivor will have the sole administration of any separate property he may leave.⁷

Again, where two spouses married in community of property by mutual will appoint the survivor of them heir of all their estate to be enjoyed by the survivor for life, and institute their children heirs after the death of both "to whatever may remain of the estate of us either jointly or severally," and the survivor afterwards makes a will appointing executors, the executors testamentary of the survivor will be entitled to administer the whole joint estate.⁸

In the absence of testamentary executors, the Master is bound to call a meeting of the surviving spouse, the next-of-kin, legatees and creditors of the deceased,⁹ in order that, after consultation with them, he may, unless, indeed, the estate is manifestly insolvent,¹⁰ appoint or grant letters of administration to such person or persons as he may think fit to be executor or executors dative of the estate of the deceased, the Master not being bound to appoint the person elected at the meeting.¹¹ The same course will also have to be followed whenever a vacancy occurs in the office of executor through death, incapacity, or removal of an executor from office.¹² In the case of an unrepresented estate, the value of which does not exceed £100, the Master may summarily appoint an executor dative without going to the expense of calling a meeting.¹³

In the case of the joint estate of two deceased

⁷ *Executors of Goedhals v. Executor of Goedhals*, 12 S. C. 361.

⁸ *Brand's Executor v. Brand's Executors*, 4 S. C. 324.

⁹ *Wessels v. Master of the High Court*, 9 S. C. 18; *In re Burger*, 1 Roscoe, 416; *In re Van Wyk*, 1

Roscoe, 34.

¹⁰ Ord. 104, secs. 21-23.

¹¹ *In re Du Pisani*, 15 S. C. 417.

¹² Ord. 104, sec. 25; *Re Southey*, 1 Buch. 15.

¹³ Act 27, 1895, sec. 8; *Boltman v. Linnehan*, 9 Buch. 162.

spouses, who were married in community of property, the correct course for the Master is to grant separate letters of administration in respect of the estate of each spouse and not to appoint executors dative to the joint estate.¹⁴ But where the Master has by an oversight taken the latter course, the executors so appointed will have no authority to administer any property acquired by the survivor after the death of the first-dying.¹⁵

Any appointment of executors dative made by the Master is subject to review by the Supreme Court or any Judge thereof, upon the application of any person interested in the estate.¹⁶

Assumed executors are appointed or assumed by executors testamentary¹⁷ as co-executors by virtue of a special authority to that effect given to them by the testator's will or by any other deed duly executed by him; but, like executors testamentary and dative, they have no authority to act as executors until they have received letters of administration from the Master.¹⁸ The Master is, however, bound to grant such letters upon the production to him of the will or other deed containing the authority to assume and of the deed of assumption itself, even where the executor testamentary dies after signing the deed of assumption, but before letters of administration have been issued to the assumed executor.¹⁹

Assumed executors are in all legal respects in exactly the same position as executors dative,²⁰ and

¹⁴ *Brand's Executor v. Brand's Executors*, 4 S. C. 323.

¹⁵ *Ibid.*

¹⁶ Ord. 104, sec. 22; *Boltman v. Linnehan*, 9 Buch. 162.

¹⁷ Where there are several executors testamentary, all will have to join in the appointment of assumed

executors (*In re Campbell*, 16 S. C. 25).

¹⁸ Ord. 104, sec. 24; *Lybrecht*, vol. 1, ch. 30, sec. 57.

¹⁹ Ord. 104, sec. 24; *De Korte v. Hofmeyer*, 1 S. C. 306.

²⁰ Ord. 104, sec. 74.

will not therefore be separately treated of any further.

Substituted and surrogated executors used to be appointed by executors testamentary by virtue of a special authority to that effect contained in the testator's will or some other deed duly executed, the former to take the place of the executor testamentary during his lifetime, the latter to succeed him in the administration of the estate after his death.²¹

Where a lunatic, for the care or administration of whose estate a curator has been appointed under Act 35 of 1891, dies intestate, or, having left a will, no executor testamentary has been appointed by him or none willing to act, such curator will have to continue the administration and distribution of the estate, just as if he were duly appointed executor dative.²²

The Master of a foreign Court is not entitled to appoint executors dative to a deceased person who at the time of his death was domiciled in the Colony, and any letters of administration issued to such executors will be treated as null and void by our Courts.²³

Foreign letters of administration will not entitle an executor to do any act of administration in this Colony, even if the deceased were at the time of his death domiciled in the country where they were granted, nor to cede nor transfer immovable property or bonds on immovable property situate in the Colony. For that purpose such executors will have to take out letters of administration in the Colony, which will be granted by our Courts upon an application to that effect in aid of the foreign letters.²⁴

²¹ *In re Titterton*, 12 S. C. 1; *Stowe v. Royal Insurance Co.*, 5 E. D. C. 37.

²² Act 35, 1891, sec. 44.

²³ *Henning's Executor v. The Master*, 3 S. C. 235.

²⁴ *Eaton v. The Registrar of Deeds*, 7 S. C. 249; *In re Maynard*, 1 Roscoe, 17; *Newdigate v. Registrar of Deeds*, 19 S. C. 269; *Re Estate Campbell*, (1905) T. S. 28.

CHAPTER XXXV.

THE QUALIFICATION OF EXECUTORS.

THE office of executor is a voluntary one, which no one can be compelled to undertake so long as he has not taken out letters of administration.¹

All persons, male as well as female, are competent to be executors, except the Master of the Supreme Court,² minors, and persons of full age who are themselves under guardianship or curatorship.³ No person also can be an executor testamentary under a will to which he has been a witness, nor can the husband or wife of such person.⁴

Letters of administration should not be granted to any one who is absent from the Colony at the time he applies for them. But where a person applying for letters of administration as executor testamentary happens to be in the Colony at the time, but ordinarily resides out of the Colony, letters should be granted to him, but it will be in the discretion of the Master whether he will grant them unconditionally or upon terms. If he is satisfied as to the *bond fide* intention and ability of the applicant to reside in the Colony until the estate shall have been fully administered, there is no reason why letters should not be granted unconditionally. But if the Master honestly believes that he will lose all control over the administration when once letters have been granted, he may impose such conditions as will reserve such control to himself; and this may most

¹ Lybrecht, vol. 1, ch. 30, sec. 3 ;
Fouché v. Meyer, 2 Menzies, 458.

² Ord. 104, sec. 36.

³ Lybrecht, vol. 1, ch. 30, sec. 5.

⁴ Act 22, 1876, sec. 4.

effectually be done by demanding security from the applicant, to which executors testamentary are not, as a rule, liable. If the applicant is unable or unwilling to give security, but is authorized to assume another person as executor, the difficulty may be met by appointing such person as assumed executor. Failing such assumption, the only course left to the Master will be to appoint an executor dative.⁵

CHAPTER XXXVI.

THE POWERS, RIGHTS, AND DUTIES OF EXECUTORS.

AN executor who has received letters of administration is somewhat in the position of an heir who had adiated with benefit of inventory under the common law,¹ but not in that of the heir of the early Roman law. The whole of the estate of the deceased is indeed vested in him, but he is the representative not so much of the deceased as of his creditors, heirs, legatees, and other persons interested in his estate.² His rights and powers are at the present day much larger than they were previous to Ordinance No. 104 of 1833, when, as pointed out above,³ an executor exercised his powers under the control and supervision of the heirs, by whom he could even be excluded from the administration altogether, unless it had been expressly otherwise provided by the testator.⁴ But

⁵ *In re Schoeman*, 10 S. C. 1; *In re Pentz*, 9 S. C. 158; *In re Moodie*, 9 S. C. 160; *Ex parte J. S. Joubert*, Kotzé, 141.

¹ *Oosthuysen v. Oosthuysen*, 1 Buch. 62.

² *Brink's Trustee v. Theron*, 4 Juta, 27.

³ See p. 212, above.

⁴ *Brink's Trustee v. Theron*, 4 S. C. 27.

except in so far as the law with respect to his duties, powers, rights, and responsibilities has been expressly altered by Ordinance No. 104, it still remains the same as before.⁵

Before entering upon his office an executor dative is bound to find security to the satisfaction of the Master, for the due and faithful administration of the estate;⁶ and if the estate is afterwards found to include more property than was at first supposed, he may be required to give additional security.⁷

Testamentary executors cannot as a rule be compelled to give security, unless, as mentioned above,⁸ they are domiciled and resident out of the Colony.

Every executor, whether testamentary or dative, is bound forthwith to have an inventory made of all property of whatever kind belonging to the estate and to transmit it to the office of the Master of the Supreme Court; and if other property is afterwards discovered to belong to the estate, additional inventories will have to be made and transmitted to the Master.⁹

In the case of an executor testamentary the transmission of the inventory to the Master may be dispensed with by the testator; and even without such dispensation an executor testamentary who is the survivor of two spouses married in community of property and appointed by the first-dying executor of his or her estate, the guardian of the minor children and the administrator of the joint estate (*boedelhouder*) during the minority of the children, or to whom the predeceasing spouse has bequeathed all his or her

⁵ Ord. 104, secs. 37, 41.

⁶ Ord. 104, sec. 27; *Wessels v. Master of the High Court*, 9 S. C. 18.

⁷ Ord. 104, sec. 28.

⁸ Page 219, above.

⁹ Ord. 104, sec. 28.

share in the joint estate, is exempted from the duty of transmitting or producing such inventory, except under an Order of Court, which will be granted upon sufficient cause shown by the Master or some person interested in the estate.¹⁰

If any executor, testamentary or dative, administers, distributes, or in any wise disposes of any property belonging to the estate which is not contained in any inventory lodged with the Master, he will be personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have become due by his estate since, and all legacies left by the deceased, in case the assets of the estate turn out insufficient for the full payment of the same,¹¹ unless he can prove to the satisfaction of the Court the true amount and value of the property which has been so unduly administered, distributed, or disposed of by him, and that such administration, distribution, or disposal was not fraudulent, in which case he will only be liable for the amount so proved, or for such part thereof as has been distributed or disposed of in a manner and for purposes contrary to law.¹²

Forthwith after entering upon his administration the executor is bound to cause a notice to be published in the Government Gazette and in such other manner as may be deemed expedient, calling upon creditors and all others having claims upon the estate to lodge their claims within a certain specified time.¹³ Beyond this

¹⁰ Ord. 104, sec. 28.

¹¹ *Ibid.*

¹² Ord. 104, sec. 29.

¹³ Ord. 104, sec. 30. Before the expiration of this specified time execution cannot be taken out upon any judgment obtained against the de-

ceased, or against his executors, nor can it be taken out even then before the expiration of six months from the date of the letters of administration (Ord. 104, sec. 31). But where a defendant dies after execution has been taken out, but before the sale

notice he is not bound to go, it being the duty of creditors to lodge their claims and not the duty of the executor to make search for creditors.¹⁴

An executor is bound to take possession of and sue for all property belonging to the estate,¹⁵ and to protect the interests of the estate with all diligence.

In instituting and defending actions, however, he will do well to proceed with caution, and not to act without taking legal advice, as he may be condemned, if unsuccessful, to pay the costs out of his own pocket.¹⁶

He must with all reasonable speed proceed to liquidate the estate; that is, to reduce it into possession cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs, but he is not bound to turn all the assets into money.¹⁷

This liquidation must take place within a reasonable time; and what will amount to such reasonable time will depend upon the special circumstances of each case, in the absence of which six months from

of the property, the sale may legally be proceeded with (*Van Reenen v. Pearson*, 1 Roscoe, 236). For the common law with respect to the distribution of an estate, see Voet, 10: 2.

¹⁴ *Kotze v. Widow Mostert and another*, 2 Buch. 199.

¹⁵ Voet, 5: 3: 1; Act 27, 1895, sec. 6; *Meiring's Executor Dative v. Meiring's Executors Testamentary*, 7 Buch. 93. Where there are several co-executors, they must, as a rule, all be joined as co-plaintiffs or co-defendants in actions in which the estate is interested (*Trustees of Wright v. Executors of Wright*, 2 Roscoe, 84; *Atmore v. Chaddock*, 13 S. C. 205); but where one of the co-executors has an interest opposed to the bringing of an action, which is required to be brought in the interests of the

estate, the Court will authorize the remaining executor to sue by himself (*Watson's Executors v. Watson*, 1 Cape Times, 159). Where one of several co-executors under a will has been at the same time appointed in it a trustee for a particular purpose, and in the latter capacity has to bring an action against the estate, he will have to be joined as co-defendant in such action (*Trustees of Wright v. Executors of Wright*, 2 Roscoe, 88).

¹⁶ *Quin v. Pilkington*, 11 S. C. 416; *Pringle v. Roscoe*, 1 Roscoe, 426; *Norden v. Brink*, 3 Menzies, 403.

¹⁷ *Heirs of Hiddingh v. De Villiers and others*, 5 S. C. 308; *In re Alexander's Minors*, 5 Searle, 310; *In re Best*, 7 S. C. 488.

the date of the letters of administration will be considered a reasonable time.¹⁸

Where loss occurs through the negligence of the executor in failing to liquidate the estate within a reasonable time or in any other way, the executor will be liable in damages;¹⁹ and, on failure to realize within six months, the burden of proving that he acted *bonâ fide* and exercised a reasonable discretion will be upon the executor.²⁰

From this liability for negligence an executor cannot free himself by granting to another person a general and irrevocable power of attorney, by which he divests himself completely of the control of the estate, such proceeding being *ultra vires* and illegal.²¹

For the purpose of liquidating the estate, an executor has full power and authority to sell the property belonging to it, both movable and immovable. Property specially bequeathed may not, of course, be sold so long as there are other assets to meet the debts; but even land and other things specially bequeathed may be sold, if the sale is necessary for the payment of the debts,²² and it would appear that a *bonâ-fide* purchaser would be protected, even if the sale were not required for the payment of debts.²³ The Court will not authorize the sale of landed property, the alienation of which has been prohibited by the will of the deceased, in order to meet existing claims against the estate, until it is satisfied that

¹⁸ *Heirs of Hiddingh v. De Villiers and others*, 5 S. C. 298; *Hiddingh v. Executors of Hiddingh*, 2 S. C. 414; *Hiddingh v. S. A. Association*, 6 S. C. 238.

¹⁹ *Atmore v. Chaddock*, 13 S. C. 205.

²⁰ *Heirs of Hiddingh v. De Villiers and others*, 5 S. C. 298; *Hiddingh*

v. Executors of Hiddingh, 2 S. C. 414; *Hiddingh v. S. A. Association*, 6 S. C. 238; *Loedolff v. The Orphan Chamber*, 1 Menzies, 486.

²¹ *Stowe v. Royal Insurance Co.*, 5 E. D. C. 37.

²² *In re Brown*, 7 S. C. 327.

²³ *Williams v. Williams and others*, 12 S. C. 397; 13 S. C. 200.

sufficient money for that purpose cannot be raised by way of mortgage;²⁴ and an executor will not be entitled to sell property specially bequeathed, even though there may be no other assets, if the person to whom it is bequeathed is prepared to pay the debts himself.²⁵

Though, however, executors may sell, they have no authority to mortgage immovable property belonging to the estate except in fulfilment of special directions to that effect contained in the will of the deceased or with the sanction or leave of the Court, which leave will not be given unless it be for the benefit of all parties interested in the estate, and even then will not override a tacit hypothecation attaching to the land, unless given for the purpose of paying the debts of the deceased.²⁶

Immovable property must, as a rule, be sold by public auction, or, if sold privately, the sanction of the heirs or other persons interested therein, or the leave of the Court, will have to be obtained;²⁷ for, though private sales are not absolutely void, they will, if made without such sanction or leave, be set aside, if it can be shown that they have prejudiced the estate.²⁸ In the case, however, of a transfer in pursuance of a sale by auction after due public notice, the land, even though specially bequeathed or otherwise subject to a tacit hypothecation, will pass free from encumbrance to the transferee, provided only he be a *bonâ-fide* purchaser.²⁹

²⁴ *In re Masters*, 1 Cape Times, 76. But see *Re De Villier's Estate*, (1902) T. S. 117.

²⁵ *Estate Van der Lih v. Conradie and others*, 20 S. C. 245.

²⁶ *In re Brown*, 7 S. C. 237; *Mechan v. Louw and De Villiers*, 4 Searle, 118; *In re Wright*, 1 Cape Times,

1; *Williams v. Williams and others*, 12 S. C. 392.

²⁷ *Ex parte Eckard*, (1902) T. S. 169.

²⁸ *Prior v. Fynn's Executors*, 3 Searle, 388.

²⁹ *In re Brown*, 7 S. C. 237; *Lange v. Liesching*, Foord, 59.

In order to sell land to better advantage, an executor may subdivide it and sell it in lots according to a general plan, in which he may reserve a certain portion for municipal or public purposes.³⁰

The sale of estate assets, whether movable or immovable, by an executor to himself, though not absolutely void, is regarded with grave suspicion, and will be subjected to the most searching inquiries, so as to ensure that it shall be perfectly *bonâ fide*. Where, for instance, an executor can show that the property was fairly submitted to public competition and purchased by him at a public auction in an open and *bonâ-fide* manner, the sale will be sustained.³¹ But the purchase must not only be *bonâ fide*, but made by the executor in an open and public manner.³² An executor may, however, in an open and *bonâ-fide* manner purchase estate assets from a co-executor.³³

An executor is technically the proper person to pass transfer of property standing registered in the name of the deceased.³⁴

Whether an executor can in his capacity as such sign promissory notes on behalf of the estate without making himself personally liable, would seem doubtful; ³⁵ but it has been decided that he may validly sign promissory notes in renewal of existing notes signed by the deceased.³⁶

An executor is bound to keep the funds belonging

³⁰ *Estate Gardiner v. Town Council, Port Elizabeth*, 19 S. C. 507.

³¹ *Nel v. Louw*, 7 Buch. 133; *Solomon v. Registrar of Deeds*, 18 S. C. 160; *Voet*, 18: 1: 9.

³² Judgment of Connor, C.J., in *Benningfield v. Baxter*, 12 App. C. 170; *Heirs of Hiddingh v. De Villiers and others*, 5 S. C. 309; *Hiddingh v. Denysen and others*, 3 S. C. 447;

Mostert v. South African Association, 1 Buch. 302; *Hiddingh v. S. A. Association*, 6 S. C. 239.

³³ *Louw v. Hofmeyer*, 2 Buch. 290.

³⁴ *Visser's Executor v. Registrar of Deeds*, 7 S. C. 98.

³⁵ *Ross and others v. Muntingh*, 1 Menzies, 39; *Jantzen v. Van den Burgh*, 2 Menzies, 233.

³⁶ *Union Bank v. Zeederberg*, 3 S. C. 215.

to the estate separate and distinct from his own, and will not be allowed to derive any benefit therefrom beyond the fees to which he is legally entitled.³⁷

An executor is also bound to carry out the wishes and directions of the testator contained in his will to their fullest extent;³⁸ and to carry out all contracts made by him.³⁹

Where there are several executors, all must join in any act of importance required to bind the estate.⁴⁰ Hence a lease of landed property belonging to the estate entered into by two out of three co-executors against the wish of the third will be void.⁴¹ And where one executor has paid to himself an amount in excess of what he is entitled to, he will be personally liable to his co-executor for the repayment of the excess.⁴²

Upon the expiration of the period allowed for lodging claims, the executor must proceed to rank, according to their legal order of preference, all debts and claims lodged with him⁴³ or of which he may have knowledge, and to pay the same as soon as the funds necessary for the purpose have been realized.⁴⁴ Any creditor who fails to lodge his claim within the period specified or afterwards before the funds are distributed, will have no right to complain if the distribution has not been made in accordance with his legal

³⁷ *Hiddingh v. Denysen and others*, 3 S. C. 445; *Henshall v. Green*, N. O., Hertzog, p. 218.

³⁸ *Atmore v. Chaddock*, 13 S. C. 205; *Ex parte Denysen v. Groenberger*, 1 Off. Rapp. 366; Voet, 10: 2: 1.

³⁹ Lybrecht, vol. 1, ch. 30, sec. 26; Voet, 27: 9: 12; *Kriel v. Kriel*, 1 S. C. 49; Voet, 20: 1: 1.

⁴⁰ *In re Campbell*, 16 S. C. 25.

⁴¹ *Parkin v. Parkin*, 2 Buch. 136.

⁴² *Hodgson v. Du Preez*, 11 S. C. 335.

⁴³ The executor may, if he thinks fit, require any person claiming to prove as creditor upon the estate to substantiate his claim by a solemn declaration (Act 27, 1895, sec. 9).

⁴⁴ The lodging of a bond claim is equivalent to the notice to pay stipulated for in the bond, no further notice being required (*Southey v. Borchers*, 1 Menzies, 22).

order of preference, and will not be entitled to recover from any other creditor who has been paid out of his due order before him, nor will he have any recourse against the executor who has fully administered the estate and no longer has any funds of the estate in his hands.⁴⁵ The only remedy a creditor would have in such a case would be to proceed against the heirs, to whom the executor has paid over the net residue of the estate.⁴⁶ Any executor, however, who has not yet fully administered the estate, but who has still got funds belonging to the estate in his hands, will to that extent continue liable to the creditors, though they may have failed to prove their claims in due time.⁴⁷

An executor is only entitled to pay debts actually due, and consequently cannot validly make a compromise with respect to a debt which is not actually due by the estate.⁴⁸

An executor who pays any debt before the expiration of the period allowed for lodging claims, or who pays the same afterwards out of its due order, when he knew of the existence of a claim which ought in law to have taken precedence, will, if the estate turn out insufficient to satisfy all claims, be personally liable to the creditor holding such preferent claim, saving to him his recourse against the party who has been unduly paid.⁴⁹ In the same way an executor may recover from an heir or from a surviving spouse whatever may have been paid to him or her in excess of what was actually due.⁵⁰

⁴⁵ Ord. 104, sec. 32; *Brink v. Esterhuysen*, 1 Menzies, 473.

⁴⁶ *Liquidators of the Paarl Bank v. Roux*, 8 S. C. 205; *Liquidators of the Union Bank v. Kiver*, 8 S. C. 152.

⁴⁷ *Moore's Executrix v. Le Sœur*,

2 Menzies, 475; *Horn v. Leodolf et Uxor*, 1 Menzies, 405.

⁴⁸ *Van Heerden v. Executrix of Van Heerden*, 21 S. C. 295.

⁴⁹ Ord. 104, sec. 32; Voet, 12: 6: 10, *in fine*.

⁵⁰ *Klerck v. Mostert*, 2 Menzies,

An executor who has paid out to the heirs and legatees the amount of the realized assets in his hands, retaining only unrealized assets, such as shares to which there is a continuing liability attaching, will be personally liable to the extent of the money so paid out, if the estate is afterwards called upon to meet such continuing liability.⁵¹ He will, however, have his recourse by way of *condictio indebiti* against the heirs and legatees; ⁵² for, as pointed out above,⁵³ the heirs are liable for the debts of the deceased, at any rate to the extent of what they have received, in proportion to their shares in the inheritance, and, after they have been excused, so also are the legatees.⁵⁴

If the executor finds that any minor not having a tutor testamentary or dative, or any lunatic not having a lawful curator, or any person absent from the Colony and not having a legal representative within the same, has a lawful claim to the estate or any part thereof, he is bound to give the Master notice of the fact.⁵⁵

As soon as the estate has been fully administered and distributed, the executor must lodge with the Master a full and true account of the whole administration and distribution of the same,⁵⁶ unless, being an executor testamentary, he has by any clause in a will or codicil been directed by the testator not to lodge

466; *Watson's Executor v. Watson's Heirs*, 8 S. C. 283; *Reis v. Executors of Gilloway*, 1 Menzies, 196.

⁵¹ *Union Bank, In re Hofmeyer*, 8 S. C. 146; *Union Bank v. Watson's Executors*, 8 S. C. 269; *Liquidators of the Union Bank v. Watson's Executors*, 8 S. C. 300; *Liquidators of the Cape of Good Hope Bank v. Van Lier's Executors*, 8 S. C. 309.

⁵² *Liquidators of the Paarl Bank*

v. Roux, 8 S. C. 205; *Watson's Executor v. Watson's Heirs*, 8 S. C. 283.

⁵³ Page 153, above.

⁵⁴ *Watson's Executor v. Watson's Heirs*, 8 S. C. 283; Voet, 29 : 2 : 26, 28-30.

⁵⁵ Ord. 104, sec. 38; *In re Best*, 9 S. C. 488; *In re Alexander's Minors*, 5 Searle, 310.

⁵⁶ Ord. 104, sec. 33; Act 11, 1873, sec. 2.

such account with the Master,⁵⁷ or unless he or she is the survivor of two spouses married in community of property, to whom the predeceasing spouse has bequeathed all his or her share in the joint estate, appointing him or her executor, tutor of the minor children, and administrator (*boedelhouder*) of the joint estate during the minority of the children, in neither of which cases will the executor be bound to lodge an account with the Master, unless ordered to do so by the Court or a Judge upon sufficient cause shown by the Master or some person interested in the estate.⁵⁸

If, when bound to do so, an executor fails to lodge his account with the Master within six months from the date of his letters of administration, he may be summoned by any person having an interest in the estate to show cause why he has not done so;⁵⁹ and, if he fail to do so within twelve months, the Master may so summon him, provided he has first given him notice of his intention so to do unless he lodges his account.⁶⁰ He may, however, obtain an extension of time from the Master or from the Court or a Judge.⁶¹

Any executor who fails to lodge his accounts without any lawful excuse, forfeits all claim to any fees to which he would otherwise have been entitled;⁶² and the Master will be justified in refusing to allow such fees, even though no decree of forfeiture may have been pronounced by the Court, but his refusal will of course be subject to an appeal to the Court.⁶³

⁵⁷ Act 14, 1864, sec. 3.

⁵⁸ Act 14, 1864, sec. 3; *In re Jamieson*, 1 Cape Times, 70.

⁵⁹ Ord. 104, sec. 33; *Master v. Van der Poel*, 2 Menzies, 472; *Fryer v. Van Zyl*, 8 Buch. 58; *Auret v. Haarhoff*, 1 Cape Times, 132; *Taute v. Executors of Rensburg*, 6 Buch.

15; *Quin v. Devine*, 6 E. D. C. 235.

⁶⁰ Act 14, 1864, sec. 1.

⁶¹ *Ibid.*, sec. 2.

⁶² Ord. 104, sec. 33; *Wessels v. Master of the High Court*, 9 S. C. 18.

⁶³ *Master of the Supreme Court v. Bruyman and another*, 17 S. C. 532.

These accounts will at all times be open to inspection by the heirs and other persons interested in the estate,⁶⁴ who will be entitled to dispute and debate the same with the executor.⁶⁵

When the estate has been fully liquidated and the debts and legacies paid, it is the duty of the executor to ascertain who are the heirs and to pay or hand over the net balance or residue of the estate to them, awarding to each his proper share ; but where administrators have been appointed by the testator's will, the net residue will have to be handed over to them.⁶⁶

Executors are entitled to certain fees, that is, to a reasonable compensation and remuneration for their services, to be assessed and taxed by the Master, which in practice have been fixed at 5 per cent. on all movable property belonging to the estate and 2½ per cent. on all immovable property.⁶⁷ If property belonging to the estate is not sold, but handed over to the heir intact, the commission allowed by the Master is 2½ per cent. on the value of movables and 1½ per cent. on that of immovables. But an executor, as already stated, who without any lawful and sufficient excuse fails to lodge his account with the Master in terms of the Ordinance, forfeits all claims to fees.⁶⁸ The Court will also disallow the fees where the administration has not been beneficial.⁶⁹

⁶⁴ Ord. 104, sec. 33.

⁶⁵ *Brand v. Neethling*, 2 Menzies, 467; *Munnik v. Neethling*, 3 Menzies, 80.

⁶⁶ *In re Best*, 8 S. C. 488; *Henshall v. Green*, N. O., Hertzog, p. 218; *Anderson v. Board of Executors*, 19 S. C. 395.

⁶⁷ *Hiddingh v. Denysen and others*, 4 S. C. 441; *Estate of Van*

der Lith v. Conradie and others, 20 S. C. 247.

⁶⁸ Ord. 104, sec. 33. The executor will, in addition, be personally liable for the costs of any proceedings taken to compel him to file his accounts (Act 44, 1863, sec. 4).

⁶⁹ *Hofmeyer v. De Wet*, 1 Buch. 342.

CHAPTER XXXVII.

THE TERMINATION OF EXECUTORSHIP.

THE office of executor terminates *ipso jure* upon the death of the executor, the surrogation of executors being no longer in use amongst us,¹ and an executor's executor not succeeding to the office vacated by his principal.²

It also terminates with the final liquidation of the estate; and where the executors are at the same time administrators under the will of the deceased, their office as executors will cease upon the liquidation of the estate, so as to release their sureties, and their office as administrators will then begin.³

Letters of administration granted to executors dative may be revoked by the Master upon production to him of any valid deed appointing an executor testamentary who is competent and willing to act, and letters of administration granted to executors testamentary may be revoked by the Court upon proof that the deed, in respect of which such letters were granted, is null or has been revoked, either wholly or in so far as relates to the appointment of executors.⁴

The insolvency of an executor does not *ipso jure* vacate his office,⁵ nor will it, standing by itself, afford sufficient ground for the removal of the executor by the Court; there must be some additional reasons, such as incapacity, or refusal to act, or gross misconduct, before the Court will order his removal.⁶

¹ *In re Titterton*, 12 S. C. 1.

² *Ridgway v. Gammie*, 5 E. D. C. 76.

³ *In re Best*, 9 S. C. 488.

⁴ Ord. 104, sec. 26; *De Bruyn v.*

De Bruyn, 4 Buch. 8.

⁵ *Trustees of Wright v. Executors of Wright*, 2 Roscoe, 84.

⁶ *Grobbeelaar's Trustee v. Grobbeelaar's Executors*, 9 Buch. 207; *In re*

In the same way absence from the Colony by itself will not be a sufficient ground for the removal of an executor,⁷ temporary absence being quite consistent with the executor's perfect capacity and willingness to perform his duties. It will have to be shown that the absence is of such a nature or has been of such duration as to amount to a refusal or unwillingness to act,⁸ as where the executor had joined the King's enemies.⁹

An executor who is temporarily absent from the Colony and who is willing to remain in office will not be removed in the absence of proof that duties requiring performance have been left unperformed, or that some act of administration, which cannot be done without his presence, requires to be immediately done.¹⁰

An executor is at all times liable to be removed by the Court on the grounds of neglect of duty and misconduct;¹¹ but the Court will not release an executor testamentary merely on the ground that he cannot agree with his co-executors as regards certain claims due to the estate, even though his co-executors may consent to his release, unless his removal can be shown to be for the benefit of the estate.¹²

An executor will also be removed on the grounds of insanity, unsoundness of mind, imbecility, or habitual intemperance incapacitating him from performing his duties.¹³

An application for the removal of an executor may

Smit, 9 Buch. 121; *In re Wicht*, 2 Menzies, 473; *Re Herman's insolvent estate*, 18 S. A. L. J. 190.

⁷ *Grobbelaar's Trustee v. Grobbelaar's Executors*, 9 Buch. 207.

⁸ *In re Esterhuysen*, 4 Buch. 1.

⁹ *Re Castelyn*, 18 S. C. 115.

¹⁰ *In re Schoeman*, 10 S. C. 4.

¹¹ *Mathlabane and another v.*

Spogter, 11 S. C. 252; *Botes v. Meere*, 7 Buch. 139; *In re Du Plessis*, 16 S. C. 575.

¹² *Re Hewson*, (1902) T. S. 123.

¹³ *In re Bester*, 3 S. C. 63; *Re G. Southey*, 1 Buch. 15; *In re Esterhuysen*, 3 Buch. 176; *In re Potgieter*, Kotze, 53; *Keane v. Coghlan*, 18 S. C. 348.

be made upon motion merely,¹⁴ but the Court will under certain circumstances, especially in the case of insanity or unsoundness of mind, order proceedings to be taken by way of summons.¹⁵ In any case, however, due notice of the application will have to be given to the executor.¹⁶ Where one of three co-executors testamentary has died and another has been removed from office, the remaining executor will be entitled to continue to act by himself.¹⁷

An executor may also for sufficient reasons be interdicted from acting as such for a time. To found such an application it will have to be shown that from circumstances personal to the executor himself, his being allowed to exercise his office for the time being would be injurious or highly dangerous to the interests of the estate; and unless some extraordinary emergency be shown to exist, the Court will not entertain it.¹⁸

CHAPTER XXXVIII.

ADMINISTRATORS AND BOEDELHOUDERS.

AFTER the estate has been fully liquidated and the debts and legacies paid, the general rule is for the executor to pay over the net balance or residue of the estate to the heirs, whether testamentary or *ab intestato*. It sometimes happens, however, that for some special reasons of his own, such as the existence of a fideicommissum or something personal to the heirs themselves, the testator does not wish them to have control of the

¹⁴ *Re G. Southey*, 1 Buch. 15; *In re Esterhuysen*, 3 Buch. 176.

¹⁵ *In re Bester*, 3 S. C. 63.

¹⁶ *In re Conn*, 1 Cape L. J. 289.

¹⁷ *In re Wicht*, 2 Menzies, 473.

¹⁸ *In re Hoets*, 2 Menzies, 465.

inheritance. In that case it is usual for a testator to appoint an administrator, to whom the executor will have to pay over the net balance or residue of the estate, and whose duty it will be to administer and manage the estate and apply the revenues in terms of the testator's will.¹ The same person is, as a general rule, appointed both executor and administrator, but even then the offices are separate and distinct, the office of the executor ceasing and that of the administrator commencing when the estate has been liquidated and reduced into possession clear of debts and legacies.² A person appointed in this double capacity will be entitled to a remuneration as administrator over and above the fees to which he is entitled as executor.³ When such an executor and administrator dies, and an executor dative is appointed in his stead, the latter, by accepting the trust, will become at the same time the administrator of the estate, and will be entitled to the management and control of the funds and property belonging thereto.⁴

Boedelhouders (literally : *estate holders*) are a special kind of administrators. A *boedelhouder* is the survivor of two spouses married in community of property, whom the predeceasing spouse has by will appointed the executor of his or her will, the tutor of his or her minor children, and the administrator of the

¹ *In re Best*, 9 S. C. 488 ; *Atmore v. Chaddock*, 13 S. C. 205 ; Lybrecht, vol. 1, ch. 30, sec. 4 ; V. D. L. 148. In order to avoid confusion in the use of words, it may be as well to point out that the terms "executor" and "administrator" are used in a different sense in the English law from what they are in our own. In the case of *Hiddingh v. Denysen and others* (3 S. C. 441) De Villiers, C.J., said : "The English 'administrator' corresponds to our 'executor

dative,' our 'administrator' to some extent corresponds to the English 'trustee,' and the English 'executor' corresponds to our 'executor testamentary.'"

² *In re Best*, 9 S. C. 488 ; *Hiddingh v. Denysen and others*, 3 Juta, 441, 443.

³ *Hiddingh v. Denysen and others*, 3 S. C. 443 ; *Heirs of Hiddingh v. De Villiers and others*, 5 S. C. 305.

⁴ *In re Best*, 9 S. C. 488.

joint estate during the minority of the children.⁵ By this arrangement the community of property which had previously subsisted between the spouses is continued between the survivor and the minor children of the marriage, until the majority of the children or until such time as may be provided by the will of the first-dying spouse,⁶ the children being liable for the debts incurred by the survivor in connection with the administration, at least to the extent of their share in the inheritance.⁷

The community may also be continued by agreement between the survivor and the children, if they be of age,⁸ or by antenuptial contract between the spouses.⁹

CHAPTER XXXIX.

GUARDIANS.

THE term "guardianship" in its widest sense embraces the care and custody of the person and the administration and management of the property, either separately or both together, of persons who, in the eye of the law, are unable to take care of themselves or manage their own affairs, whether on account of minority, unsoundness of mind, or some bodily defect, prodigality, or absence from the Colony.¹

The person over whom the guardianship is

⁵ Ord. 104, secs. 28, 37; G. 2: 13: 1; V. D. K., Th. 266-276.

⁶ *Cloete v. Cloete's Trustees*, 5 S. C. 66; G. 2: 13: 1; Schorer, Notes 108, 109; V. D. K., Th. 266, 267, 320.

⁷ *Cloete v. Cloete's Trustees*, 5 S. C. 59.

⁸ V. D. K., Th. 266.

⁹ V. D. K., Th. 269.

¹ Voet, 26: 1: 1, 7; G. 1: 11: 1

exercised is called the "ward," and the person who exercises it the "guardian."

Guardians are guardians either over minors or over wards of full age.

Guardians over minors are either natural guardians or guardians by appointment.

CHAPTER XL.

NATURAL GUARDIANS.

NATURAL guardianship is that of parents over the person and property of their minor children.

The law in force previous to Ordinance No. 105 of 1833 with respect to paternal power and the rights, duties, and obligations of fathers and mothers over and to their legitimate children, and of mothers over and to their illegitimate children, remains unaffected by that Ordinance, except in so far as it has been expressly repealed thereby.¹

With respect to legitimate children, their father is the natural guardian,² and both in that capacity and in the exercise of his parental authority he is, as a general rule, and in the absence of any special reason to the contrary,³ entitled to the custody and control of the person of his children,⁴ whilst they are under age.⁵ It follows that, as a general rule, minor children have

¹ Ord. 105, sec. 23.

² A father cannot, however, be regarded as the guardian of his children before they are born (*In re Lutgens*, 2 Menzies, 315).

³ *Woodford v. Woodford*, 11 S. C. 141.

⁴ *Simey v. Simey*, 3 S. C. 1; *Bos-*

well v. Johnson, 1 Roscoe, 16; Voet, 26: 1: 1; 25: 4: 1; 25: 3: 20; G. 1: 6: 1; *Painter v. Painter*, 2 E. D. C. 147; *Goldsworthy v. Goldsworthy*, 10 S. C. 139; *Barker v. Barker*, 14 S. C. 113.

⁵ *Van Rooyen v. Werner*, 9 S. C. 428; Voet, 15: 1: 11.

the same domicile as their father, and, when the father changes his domicile, they also lose their domicile of origin and acquire the new domicile of their father.⁶ The father also has the control of his children's education, and this he may exercise not only whilst he is alive, but even by will after his death,⁷ unless there be some special reason to justify the Court, in its capacity as the Upper Guardian of all minors, in interfering with the father's discretion in the interests of the children.⁸

The mother's rights of control over the person and property of her children do not arise until after the death of the father,⁹ and then only if the father has not by will made special arrangements in that respect by the appointment of testamentary tutors or otherwise.

In the absence of such testamentary disposition on the part of the father, the mother will be entitled to the custody and control of the children and to the direction of their education as fully as the father was, unless there are special reasons to the contrary justifying the interference of the Court.¹⁰ She will, for instance, be deprived of such custody, control, and education, if she lead an immoral life or wishes to defray the costs of their education out of their own funds when some other relation is prepared to undertake such education for nothing.¹¹

With reference to illegitimate children, the mother alone, and not the father, is recognized as the natural guardian.¹²

⁶ *Hull, N. O., v. McMaster and others*, 5 Searle, 225.

⁷ *Van Rooyen v. Werner*, 9 S. C. 428; V. D. L. 92.

⁸ Voet, 27: 2: 1.

⁹ *In re Brown*, 11 S. C. 207; V. D. L. 92.

¹⁰ Voet, 27: 2: 1; *Van Rooyen v. Werner*, 9 S. C. 430; *Riggs v. Culf*, 3 Menzies, 76; *Bekker v. Van Heerden*, 14 S. C. 398.

¹¹ Voet, 27: 2: 1.

¹² *Hatch v. Hatch*, 9 S. C. 1; *Van Rooyen v. Werner*, 9 S. C. 430;

It must further be observed that even where a curator nominate has been appointed to a minor by some testator who has bequeathed property to him, the natural guardianship of the parents over the person and the rest of the property of the minor continues,¹³ but they will not be entitled to exercise any of the functions of the appointed guardian.¹⁴

Parents are, on the other hand, bound to maintain their children,¹⁵ nor does it make any difference, either as regards the father or the mother, whether the children are legitimate or illegitimate, provided only in the latter case that it is certain who the father is.¹⁶ In case of divorce the children have to be maintained at the expense of both parents in proportion to their means.¹⁷ The mode or style of maintenance is left to the discretion of the Court.¹⁸

The duty to provide maintenance ceases when the children are earning their own livelihood and capable of maintaining themselves,¹⁹ and when the children are possessed of property of their own upon the income derived from which they may maintain themselves, in which latter case the parents may claim a reasonable proportion of such income for their maintenance. So

Koytyo v. Sibaru, 7 E. D. C. 186;
Mayo v. Poro, 14 E. D. C. 8.

¹³ *Riggs v. Calff*, 3 Menzies, 76;
Eksteen v. Eksteen's Executors, 4 S. C. 15; G. 1: 7: 8.

¹⁴ *Munnik v. Neethling*, 3 Menzies, 80.

¹⁵ Voet's Summary to book 38: 17, sec. 24, and Voet, 25: 3: 6; V. L., vol. 1, p. 90.

¹⁶ *Ex parte Lievengeld*, 4 S. C. 64; *Kramer v. Findlay's Executors*, 8 Buch. 51; *Carelse v. Estate of De Vries*, 16 Cape Times Reports, 787; Voet's Summary to book 38: 17, sec. 8, and Voet, 25: 3: 6. The mode of compelling maintenance is not by way of action, but by way of sum-

mary application to the Court for an order compelling the parent to supply such maintenance, unless indeed the paternity is denied, and such application may be made not only by the child himself, but by some relation on his behalf (Voet, 25: 3: 13; 24: 1: 3). In case of emergency a temporary order may be granted by a single Judge (Ord. 105, sec. 23); and under Act 7, 1895, a Resident Magistrate has jurisdiction to decree maintenance to children who are left in a state of destitution by their parents.

¹⁷ Voet, 25: 3: 6.

¹⁸ Voet, 25: 3: 4, 13.

¹⁹ Voet, 15: 1: 4; 25: 3: 14.

much is this the case that even when a stranger has left property to a minor upon the express condition that the income derived from it is to be allowed to accumulate and to be added to the capital, the parents may nevertheless demand that maintenance shall be allowed out of it to the children.²⁰ Parents are not, however, allowed to draw upon the capital of their children for their maintenance, if the interest thereof alone is insufficient, but will be obliged to make up the deficiency out of their own estate or daily income, unless they are themselves in narrow circumstances, in which case the Court will, upon application to that effect, grant leave to apply some portion of the capital for the children's maintenance.²¹

Where a mutual will gives the survivor the usufruct of the deceased's half-share until the majority of the children and for the purposes of their education, the survivor, if he accept the usufruct, will be bound to educate the children in a suitable manner, however trifling such usufruct may be; and, if the amount expended exceeds the amount of the usufruct, he will not be entitled to recover the excess from the children upon their majority nor deduct it from their share in the estate of the first-dying.²²

With respect to the property of their minor children, parents have certain rights, partly by virtue of their parental authority, and partly in their capacity as natural guardians. Such property is either *profectitious* or *adventitious*.²³

Profectitious property is such as has been derived from the parents themselves either directly or

²⁰ Voet, 25: 3: 15; V. D. K., Th. S. C. 28.
105.

²¹ *Re Ogilvie*, 6 E. D. C. 131; 435.
Voet, 25: 3: 16; *In re Glynn*, 15

²² *Prince v. Dieleman*, 1 Menzies,

²³ Voet, 15: 1: 3.

indirectly, such as gifts given to infants by their god-parents, which are considered as given out of regard for the parents rather than the children.²⁴ All such property, according to some text-writers, belongs in full ownership to the parents.²⁵ It has, however, been decided by the Supreme Court that a parent may in an open and *bonâ-fide* manner, and at a time when he is solvent, make a valid gift to a child, and in such a way as to secure it against any liability for his own debts.²⁶ There must, however, be clear proof of the intention of the parent to make the donation, and delivery or something equivalent thereto is essential. Where such a donation has been registered in the office of the Registrar of Deeds, it will be valid whatever the amount may be. In the absence of registration the donation will not be complete without clear proof of acceptance by the child or by the parent on behalf of the child. Acceptance by the child alone will be sufficient if he has attained the age of puberty; but if he is under that age, the gift will have to be accepted by the Court, the Master, or the parent on his behalf. Whether the minor be under or above the age of puberty, the complete acceptance by the father would be sufficient; but such acceptance would be incomplete without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third party, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child.²⁷

²⁴ Schorer, Note 28; Groen., De Leg., D. 15: 1: 19. But see V. D. K., Th. 104.

²⁵ Voet, 15: 1: 3, 4; Schorer, Note 28.

²⁶ *Elliott's Trustees v. Elliott*, 3 Menzies, 86; *Thorpe's Executors v. Thorpe's Tutor*, 4 S. C. 488; *Russell*

v. Von Grossouw, 1 Kotze, 112; *Geyer v. Geyer's Trustee*, 13 E. D. C. 74; V. D. K., Th. 485; Groen., De Leg., Inst. 3: 20: 6: 3.

²⁷ *Slabbert's Trustee v. Neeser's Executor*, 12 S. C. 163; *In re Roselt v. Inglis*, 1 Kotze, 13; *Barrett v. Executor of O'Neil*, *ibid.* 104.

The statement of the law, therefore, as laid down by the above-mentioned text-writers, can no longer be accepted in its entirety. One thing, however, is clear, that even at the present day, if minors live with their parents and are maintained by them, whatever they earn by their own labour goes to their parents,²⁸ it being considered as a set-off against their maintenance, even though the father or mother may have undertaken to maintain the children till their majority, in consideration of the usufruct of the goods of the predeceased spouse.²⁹

If, however, a son living with his father carries on a separate business or carries on a business in partnership with the father, the latter will not be entitled to the profits derived by the son from such business, and much less will he be so if the son lives separately from the father.³⁰

Adventitious property is such as is not derived from the parents or from third parties on their account. Such property belongs to the child in full ownership,³¹ the parents being not even entitled to the usufruct thereof, unless the person from whom the property was derived has expressly given the usufruct to the parents or unless the usufruct is required for the maintenance or education of the child.³²

In his capacity of natural guardian, however, the father has the full administration and management of such property, almost to the same extent as an appointed guardian, unless a curator nominate has been

²⁸ Voet, 15: 1: 4; 25: 3: 14; 39: 5: 6; G. 1: 6: 1; 3: 2: 8; V.D.K., Th. 104; V.L., vol. 1, pp. 193, 452; V.L., C.F., part 1: 2: 12: 14; V.D.L. 214; Groen., De Leg., Inst. 2: 9: 1; 3: 28: 1.

²⁹ Schorer, Note 27.

³⁰ Voet, 15: 1: 4, 5.

³¹ Voet, 15: 1: 3.

³² *Van Rooyen v. Werner*, 9 S.C. 429; *Van der Byl & Co. v. Solomon*, 7 Buch. 27; Voet, 15: 1: 6; G. 1: 6: 3; Schorer, Note 28; V.L., vol. 1, p. 86; Groen., De Leg., Inst. 2: 9: 1.

appointed for the administration of the same,³³ or unless the natural guardianship of the father has been expressly excluded with regard to it by the person from whom such property may have been derived,³⁴ and consequently payments made to the father of moneys due to the minor will be valid.³⁵

His powers are, however, somewhat limited. He may invest his child's money and enter into contracts on his behalf, provided he has funds in hand to meet them.³⁶ But an executory contract so entered into by him, and not fully carried out, will not be binding upon the child, unless ratified by him upon his attaining his majority.³⁷

Further, if a father allows his minor son to enter into a contract with his sanction and authority, he will be himself liable upon such contract not only to the extent of the child's property in his possession, but *in solidum* for the whole amount of the contract.³⁸ But a contract entered into by a minor without his father's consent will be *ipso jure* null and void,³⁹ and will not bind either himself or his father, except in so far as either of them has been enriched thereby;⁴⁰ and, if any payment has been made by the minor under such contract, it may be recovered by the *condictio indebiti*.⁴¹ This rule, however, will not apply where the minor has fraudulently held himself out as being a major, or

³³ *In re Lutgens*, 2 Menzies, 315; Voet, 45: 1: 4.

³⁴ *Van Rooyen v. Werner*, 9 S. C. 429; *Eksteen v. Eksteen's Executors*, 4 S. C. 15; *Van der Byl v. Solomon*, 7 Buch. 25; *In re Hopkins*, 11 S. C. 36; G. 1: 6: 1; 1: 7: 8; Schorer, Note 27; V. D. K., Th. 102; V. L., vol. 1, p. 85.

³⁵ *Van Rooyen v. Werner*, 9 S. C. 430.

³⁶ *Elliott's Trustee v. Elliott and his Curator ad litem*, 3 Menzies, 91; G. 3: 1: 38; V. D. K., Th. 478.

³⁷ *Van der Byl v. Solomon*, 7 Buch. 25; G. 3: 1: 28.

³⁸ Voet, 15: 1: 11.

³⁹ *Bekker v. Van Heerden*, 14 S. C. 398.

⁴⁰ G. 3: 1: 26.

⁴¹ Voet, 15: 1: 11; V. D. L. 93.

has publicly carried on a trade, profession, or business as a major.⁴²

It is, of course, unnecessary to add that parents are not liable in damages for the torts of their children.⁴³

A father may also appear for his minor child in Court, and may, without the leave of the Court, sue and defend actions on his behalf;⁴⁴ but, if he does so without leave and is unsuccessful, he will run the risk of having to pay the costs out of his own pocket,⁴⁵ though leave will sometimes be granted *ex post facto* upon sufficient ground shown.⁴⁶

Natural guardianship terminates (1) upon the death of the parent or child;⁴⁷ (2) upon the majority of the child, whether by attaining the age of twenty-one years,⁴⁸ or by the marriage of the child, whether male or female, the guardianship not being revived in the last case, if the marriage is dissolved before the child attains the age of majority;⁴⁹ and (3) upon the parent himself being placed under curatorship.⁵⁰ It does not, however, cease with the insolvency of the parent,⁵¹ nor does it cease *ipso jure* upon the second marriage of the mother.⁵²

Natural guardianship may also be dissolved by the tacit emancipation of the child by the parent, as where a father knowingly allows a son to live apart from him

⁴² Voet, 4: 4: 43, 50, 51; *Nangle v. Mitchell*, 18 E. D. C. 56.

⁴³ *January v. Kilpatrick*, 2 E. D. C. 18; *Queen v. Obani*, 3 E. D. C. 333; *Ncontosi v. Nolenti and another*, 19 S. C. 417.

⁴⁴ *Van Rooyen v. Werner*, 9 S. C. 430; G. 1: 6: 1.

⁴⁵ *Van der Walt v. Hudson*, 4 S. C. 327.

⁴⁶ *Ex parte Montmort*, 6 S. C. 118.

⁴⁷ Voet, 1: 7: 9.

⁴⁸ Ord. 62, 1829, sec. 1; Voet, 1: 7: 15; 15: 1: 11.

⁴⁹ Voet, 1: 7: 13, 14; 4: 4: 6, 9; 26: 1: 5; 23: 2: 17, 23, 40; G. 1: 6: 4; Schorer, Note 29; V. D. L. 95; V. L., vol. 1, p. 87.

⁵⁰ Voet, 1: 7: 13; G. 1: 6: 5.

⁵¹ *Van der Walt v. Hudson*, 4 S. C. 327.

⁵² *Greybe v. Wiid*, 3 Menzies, 73; Voet, 26: 4: 4. See also G. 1: 7: 11; Schorer, Note 33.

and openly to carry on some business, trade, or calling on his own account.⁵³

In former years, emancipation could also take place expressly by a decree of *venia ætatis*,⁵⁴ but this procedure has now become obsolete in this Colony.⁵⁵ In one case the Court refused to declare a minor a major, but discharged him from tutelage, so as to entitle him to have a legacy, which was due to him, paid over to him from the Guardians' Fund.⁵⁶

CHAPTER XLI.

THE APPOINTMENT OF GUARDIANS.

GUARDIANS are appointed only to persons who are subject to the jurisdiction of the Courts of the Colony by reason either of domicile or of property situate within such jurisdiction.¹

Such appointments are made either by the Master of the Supreme Court or by the Court itself, the guardians so appointed being called tutors testamentary, dative or assumed, or curators nominate, dative or assumed, or *bonis*.

A testamentary tutor is appointed to undertake the guardianship of such minor by will or some other

⁵³ *Van Rooyen v. Werner*, 9 S. C. 429; *Cairncross v. De Vos*, 6 Buch. 5; *Hofmeyer v. Thuynsma*, 2 Roscoe, 4; *Ex parte Streicher*, 3 S. C. 58; *Pienaar v. Godden*, 10 S. C. 131; *Fouché v. De Villiers*, 3 E. D. C. 147; *Cohen v. Sytner*, 14 S. C. 13. Voet, 1: 7: 12; G. 1: 6: 4; V. L., vol. 1, p. 89.

⁵⁴ Voet, 1: 7: 11; 26: 1: 5; 4:

4: 3-5; G. 1: 10: 3; V. D. K., Th. 107; V. D. L. 95.

⁵⁵ R. Obs., pt. 2, obs. 7, and the Supplement to the said Observation.

⁵⁶ *In re Cachet*, 15 S. C. 5; 8 Cape Times, 9.

¹ *South African Association v. Widow Voet*, 3 Menzies, 79; Voet, 26: 5: 2.

deed duly executed by the father of such minor, or by the mother if the father be dead,² but not by any other relation of the minor nor by an outsider.³ Where the father, being the first-dying of the spouses, appoints a tutor testamentary, the mother may upon her death appoint a co-tutor with equal authority.⁴

Curators nominate are appointed by persons who give or bequeath any property to a minor or to an insane person, for the purpose of administering and managing the property so given or bequeathed during the minority or during the continuance of the insanity of the donee or legatee.⁵ In making such appointment it is not necessary that the word "curator" should actually be used, provided that the object for which the appointment is made is clear.⁶

Upon the production to him by the tutor testamentary or curator nominate so appointed of the will or other deed in which the appointment has been made, the Master of the Supreme Court is bound to issue letters of confirmation to such tutor or curator.⁷ If no such application is made, the Master, if aware that such an appointment has been made, will have to take the initiative and inquire of the person appointed whether he is willing to act, and, if so, grant him the necessary letters of confirmation.⁸

When it comes to the knowledge of the Master that any estate or property situate within this Colony, for the administration of which no curator nominate

² V. D. L. 100.

³ Ord. 105, secs. 1, 2; *Eksteen v. Eksteen's Executors*, 4 S. C. 16; *Van Rooyen v. Werner*, 9 S. C. 429; *Brink's Curator v. Brink's Trustee*, 5 Searle, 341, 342; Voet, 26: 2: 1, 4, 5.

⁴ Voet. 26: 2: 5; Ord. 105, sec. 3; G. 1: 7: 9; V. D. K., Th. 118.

⁵ Ord. 105, sec. 1; *Eksteen v. Eksteen's Executors*, 4 S. C. 13; Voet, 26: 2: 5; V. D. L. 100.

⁶ *Brink's Curator v. Brink's Trustee*, 5 Searle, 343; *Eksteen v. Eksteen's Executors*, 4 S. C. 13; *Van Rooyen v. Werner*, 9 S. C. 429.

⁷ Ord. 105, secs. 2, 3, 4.

⁸ Ord. 105, secs. 3, 4.

has been appointed, has devolved upon or come to belong to any minor who is within this Colony,⁹ and who is not under the natural guardianship of father or mother¹⁰ or of tutors testamentary duly confirmed, or to whom tutors testamentary, though appointed, have not been confirmed, it will be his duty to call a meeting of the relatives both paternal and maternal of such minor, for the purpose of consulting them, and then granting letters of confirmation to such persons as he may think fit to be tutors dative to such minor,¹¹ due regard being had to the claims of the mother and of the nearest male relations, on both father's and mother's side, to such appointment.¹² The appointment will be subject to review by the Supreme Court or a Judge thereof, by whom the appointment of the Master may be set aside and another appointment made.¹³

The same proceedings will have to be taken whenever a vacancy occurs in the office of any tutor testamentary, dative or assumed, or of any curator nominate or assumed.¹⁴

Assumed tutors are appointed by tutors testamentary, and assumed curators by curators nominate under and by virtue of a special authority to that effect contained in the will of, or in any other deed duly executed by, the person who appointed such tutor testamentary or curator nominate.¹⁵ As, however, the same law applies to assumed tutors and curators as to tutors

⁹ An appointment of a tutor dative to a minor out of the Colony is invalid (*South African Association v. Executors of Voget*, 3 Menzies, 79). Where there are minors within the jurisdiction upon whom no property has devolved but whose interests require the appointment of guardians, the Court will appoint superintending guardians (*Ex parte the Committee*

for the Management of Juvenile Emigrants, 3 Menzies, 72; *Ex parte Munich*, Kotze, 15).

¹⁰ G. 1 : 7 : 8; *In re Minors Leach*, 13 S. C. 296.

¹¹ Ord. 105, sec. 6; Voet, 26 : 5 : 5.

¹² Ord. 105, sec. 7; Voet, 26 : 4 : 4.

¹³ Ord. 105, sec. 7.

¹⁴ Ord. 105, sec. 9.

¹⁵ Ord. 105, sec. 8; Voet, 26 : 2 : 5.

and curators dative, it will not be necessary to treat of them separately any further.¹⁶

Guardians, whether tutors testamentary or dative or assumed, or curators nominate or dative or assumed, derive their authority to act as such entirely from the letters of confirmation granted by the Master,¹⁷ and any guardian who attempts to act without such letters will be merely in the position of a protutor.¹⁸ But tutors testamentary and curators nominate may, without such letters, do whatever is necessary for the preservation and safe custody of the property of their ward.¹⁹

Curators dative are appointed by the Court to lunatics and insane persons who are within the Colony, upon the application of the Master or some person interested in such lunatic or insane person;²⁰ and such application the Master will be bound to make whenever it comes to his knowledge that any estate or property within this Colony (not being an estate or property for the administration and management of which a curator nominate has been appointed) has devolved on or come to belong to a lunatic or insane person.²¹

The course of procedure upon such application is for the Court first of all to appoint a curator *ad litem*²²

¹⁶ Ord. 105, sec. 8.

¹⁷ Ord. 105, sec. 2, 4, 8.

¹⁸ *Redelinghuys v. Watermeyer*, 3 Buch. 57; *Barry's Trustee v. Hodgson*, 3 S. C. 249.

¹⁹ Ord. 105, secs. 2, 3, 4; Voet, 26: 3: 1.

²⁰ *In re Mary Arthur*, 1 Cape Times, 130; *Vuyk v. Vuyk*, Kotze, 19. In this last case the Transvaal High Court allowed a lunatic to be removed to an asylum beyond its jurisdiction, there being none available within it.

²¹ Ord. 105, sec. 11; Voet, 27:

10: 3.

²² Curators *ad litem* are appointed whenever a minor or lunatic who has no guardian requires to bring or defend an action, or whenever a cause of action arises between a minor or lunatic and his guardian, for the purpose of assisting such minor or lunatic in such action (*Ex parte Van Manen*, 1 Kotze, 259; 6 S. C. 95; 4 Buch. 41, 42; 1 S. C. 109; 7 E. D. C. 75; *Re Day*, 8 E. D. C. 77; Voet, 26: 6: 1; 26: 1: 7; Ord. 105, secs. 14, 15).

to the alleged lunatic, after which a summons has to be taken out against the lunatic, duly assisted by his curator *ad litem*, which will have to be served both upon the lunatic and the curator *ad litem*, calling upon them to show cause why he should not be adjudged to be of unsound mind and incapable of managing his affairs, and why curators dative should not be appointed for the care of his person and the administration of his property, either both or singly.²³ Upon the appointed day the Court makes a full inquiry into the matter by examining witnesses, and, if need be, the lunatic himself, and then makes the necessary order.²⁴

Under Act 35 of 1891, however, the Court is empowered to appoint a curator for the temporary care or custody of the property of any person who has been declared a lunatic, or of a person lawfully detained as a criminal lunatic or dangerous lunatic;²⁵ but if a permanent curator is required, the procedure above laid down will have to be followed;²⁶ and where an alleged lunatic had, even before the enactment of that Act, been indicted for some crime, and the jury found that he was at the time of the commission of the crime of unsound mind, the Court afterwards summarily declared him to be of unsound mind and placed him under curatorship without any further inquiry.²⁷

Where the Court has placed a person under curatorship without any inquiry or examination into his state of mind, and without his having had notice of any suit or application for the purpose, the decree placing such

²³ *Ex parte Ziedeman*, 1 Menzies, 525; *In re Wiese*, 3 Menzies, 93; *Master v. Lehman*, 4 E. D. C. 308; *Protecteur Insurance Co. v. Erwin*, 4 S. C. 108; *Brook v. Brook*, 18 E. D. C. 109; *In re Knoop*, 1 Cape L. J. 115; Voet, 23: 2: 48.

²⁴ Voet, 27: 10: 2, 3.

²⁵ Act 1, 1897, sec. 15 (3) and sec. 34.

²⁶ *Ex parte De Villiers*, 21 S. C. 246.

²⁷ *In re Keltenbach*, 3 Menzies, 100.

person under curatorship will be void, even though it may have been obtained under and by virtue of the will of the alleged lunatic's father.²⁸

When a person has once been declared a lunatic, and a vacancy afterwards occurs in the office of curator dative appointed to him or in that of curator nominate appointed to administer any property left to him, such vacancy will be filled up by the Master appointing a curator dative in the same way as he appoints tutors dative and without the intervention of the Court.²⁹

Where a minor is insane, the proper course is to appoint a tutor dative to him as such minor, and not a curator dative to a lunatic.³⁰

In order to have a person declared a prodigal and to have curators dative appointed to him, the same procedure will have to be taken as in the case of a lunatic.³¹ Curators, who are generally spoken of as "curators *bonis*," are also appointed by the Court to persons who through some bodily defect, such as deafness, dumbness, or some chronic disease, are unable to manage their own affairs and require the assistance of some one else for the purpose.³² In these cases the curators will only assist their wards with their advice, authority, and help in so far as the latter are prevented by their bodily defect from transacting and administering their affairs at their own discretion.³³

Curators dative are also appointed by the Master

²⁸ *Van der Spuy v. Maasdorp*, 2 Menzies, 420; Voet, 27 : 10 : 10.

²⁹ Ord. 105, sec. 12.

³⁰ Voet, 27 : 10 : 2.

³¹ *Combrinck v. Combrinck and Wilson*, 7 Buch. 72; *In re Filmer*, 5 Buch. 2; *Re Chism*, 9 S. C. 61; *In re Miller*, 9 S. C. 414; *In re Isaac Johannes De Jager*, 16 S. C. 222; Voet, 27 : 10 : 6, 8; G. 1 : 11 :

4; V. D. K., Th. 165; R. Obs., pt. 3, obs. 20.

³² G. 1 : 11 : 2.

³³ Voet, 27 : 10 : 13; *Re Rens*, 3 Menzies, 100; *In re J. Rensburg*, 3 Menzies, 99; *In re H. P. J. Rensburg*, *ibid.*; *Executors of Waterman v. Wolfrey*, 1 Buch. 23, 139; *In re Hawkins*, 1 Buch. 23, 235; *Re Moorcroft*, 10 E. D. C. 101.

to the estate or property situate within this Colony of persons absent from it and not having a legal representative within it; and to estates of deceased persons pending the appointment of executors.³⁴ Such an appointment is only made after a meeting of all persons whom it may concern.³⁵ The Court will itself also sometimes, in the interests of an absent person, appoint a curator *bonis* to act for him until he can himself make other arrangements;³⁶ and the same course will be followed whenever it is necessary or expedient that some person should have the immediate charge of property whilst proceedings for the granting of letters of confirmation to tutors testamentary or dative or curators nominate or dative are pending, the appointment being subject to review by the Court.³⁷

CHAPTER XLII.

THE QUALIFICATION OF GUARDIANS.

GUARDIANSHIP is at the present day a purely voluntary office, which no one can be compelled to undertake against his will.¹ But if a bequest is made to any one in consideration of his undertaking the office of guardian, he will be bound to accept the guardianship or forfeit the bequest.²

A guardian must be duly qualified to act as such,³

³⁴ Ord. 104, sec. 19; *In re Melass*, 13 S. C. 97.

³⁵ Ord. 105, sec. 13; Act 27, 1895, sec. 12.

³⁶ *In re Edden*, 1 Roscoe, 161.

³⁷ Ord. 105, secs. 14, 15; Ord. 104, sec. 19; Voet, 42: 7.

¹ Ord. 105, sec. 3.

² Voet, 27: 1: 6.

³ Ord. 105, sec. 3.

and the same disqualifications attach to guardians generally as before the passing of Ordinance No. 105 of 1833 attached to tutors testamentary.⁴

The Master of the Supreme Court cannot be appointed a guardian.⁵

Guardianship is an office generally confined to males, from which all females, with the exception of the mother and grandmother of a minor, are excluded.⁶ A wife may, however, be appointed curator to the property of her insane husband, though she cannot be curator to his person.⁷

Minors and persons who are themselves under guardianship are disqualified from being guardians,⁸ and so also are persons marked with infamy.⁹

No one can be appointed tutor dative who is not subject to the jurisdiction of the Courts of the Colony,¹⁰ nor will the Court appoint a person curator to a lunatic, who is domiciled out of the jurisdiction, or whose interests are opposed to those of the lunatic.¹¹

No one can be appointed tutor to a minor who has been expressly prohibited from being such by the will of the father or mother of the minor.¹²

Parents may be appointed curators to their children, and *vice versâ* children to their parents, who have been judicially declared to be of unsound mind or prodigals.¹³ Nor is there anything to prevent a stepfather from being appointed tutor testamentary or dative to his

⁴ Ord. 105, sec. 17.

⁵ *Ibid.*, sec 40; *In re Horak*, 3 Menzies, 94.

⁶ Voet, 26: 1: 2; 26: 4: 4; G. 1: 6: 8; V. D. K., Th. 114; V. D. L. 98.

⁷ *In re De Jager*, 6 Buch. 228; *In re Oosthuysen*, 1 Kotze, 98; Voet, 27: 10: 10; 23: 2: 48; G. 1: 11:

7; Schorer, Note 47; V. D. K., Th. 168.

⁸ Voet, 26: 1: 3, 4, 5; G. 1: 7: 6; V. D. L. 98.

⁹ Voet, 26: 1: 4.

¹⁰ Voet, 26: 5: 3.

¹¹ *Berman v. Segall*, 20 S. C. 99.

¹² Voet, 26: 1: 4.

¹³ Voet, 27: 10: 10; 23: 2: 48.

stepchildren, provided it is not clearly opposed to the interests of the children.¹⁴

A person who has been witness to a will, and the husband or wife of such person, will be incompetent to be a testamentary guardian under such will.¹⁵

The Court will in no case appoint the secretary or other officer "for the time being" of a company as curator, but will only appoint such person specifically in his individual name.¹⁶

CHAPTER XLIII.

THE LEGAL POSITION OF MINORS AND OF WARDS GENERALLY.

In the eye of the law a minor is, as a general rule, incompetent to do any valid legal act, and it is to supplement this incapacity that the authority or sanction of a guardian is required.¹ A minor, as a general rule, cannot bind himself by contract or appear in Court without the authority of his tutor,² and this authority must be unconditional and given in express terms or by conduct.³ The necessity for this authority, however, varies in different cases: in some few it is not necessary at all; in most it is both necessary and sufficient; and in others it is necessary but not sufficient by itself, some additional authority being

¹⁴ Voet, 26: 4: 4.

¹⁵ Act 22, 1876, sec. 4.

¹⁶ *In re McKenny*, 4 E. D. C. 41.

¹ G. 3: 1: 26.

² *Gantz v. Wagenaar*, 1 Menzies, 92; *Pienaar v. Godden*, 10 S. C. 131; *Willmer v. Rayner*, 21 S. C.

423; *Auret v. Hind*, 4 E. D. C. 283; *The Queen v. Peter*, 12 E. D. C. 220; Voet, 27: 4: 1; 27: 6: 1; 4: 1: 13; G. 1: 8: 5; V. L., vol. 1, p. 135; V. D. K., Th. 127; R. Obs., pt. 2, obs. 11.

³ Voet, 26: 8: 1.

required, without which the transaction would be void.⁴

The authority of a guardian is not necessary in transactions in which a minor benefits himself, and, without binding himself to another, binds that other to him or obtains possession of property.⁵ Nay, a minor may even bind himself by contract in all cases in which, and to the extent to which, he is enriched thereby at the expense of another;⁶ and by the word "enriched" is meant not merely that the minor has had the best of the bargain, but that, considering all the circumstances of the case, the contract has been for his benefit, the burthen of proving that it has been so being upon the person seeking to enforce the contract against the minor.⁷ By delict also a minor may bind himself whenever he is of an age to be criminally responsible, that is, over seven years of age.⁸

The tutor's authority is both necessary and sufficient in all cases in which there is a question of binding the minor, that is, in all bilateral contracts, for a contract entered into without the tutor's consent will be a mere one-sided one, being binding upon the other party thereto, whenever it is for the benefit of the minor, but the minor himself remaining free.⁹ To this rule, however, there are several exceptions, namely: (1) When the minor has been benefited by the contract; (2) when at the date of the contract the minor has been tacitly emancipated from the natural guardianship

⁴ Voet, 26: 8: 2.

⁵ *Ibid.*

⁶ *Nel v. Divine, Hall & Co.*, 8 S. C. 16; *Johnstone v. Keiser*, 1 Kotze, 166; Voet, 26: 8: 2; G. 1: 8: 5.

⁷ *Nel v. Divine, Hall & Co.*, 8 S. C. 18.

⁸ Voet, 26: 8: 2; 2 E. D. C. 392; 4 E. D. C. 279.

⁹ *Gantz v. Wagenaar*, 1 Menzies, 92; *Fouchee v. De Villiers*, 3 E. D. C. 147; *Auret v. Hind*, 3 E. D. C. 354, and 4 E. D. C. 283; Voet, 26: 8: 3; 23: 2: 43.

of his parents by having been allowed to trade or to carry on or practise any business or profession on his own account, in which case he may validly bind himself in connection with such trade, business, or profession; ¹⁰ (3) when the minor has falsely represented himself to be of full age and has deceived the other contracting party by such representations; ¹¹ (4) when the minor has ratified his contract on coming of age. ¹² A minor, however, who wishes to enforce a contract entered into by him without his guardian's authority, will, of course, be bound to fulfil it on his own part. ¹³

The tutor's authority is necessary but insufficient, whenever there is a question of alienating or burdening immovable property belonging to the minor. For this purpose the permission of the Court, in its capacity as Upper Guardian of minors, will be required. ¹⁴

Lastly, there are cases in which the authority of a tutor is utterly useless and void, as when the tutor interposes it for his own benefit or that of his children in a matter in which his interests or theirs are opposed to those of the minor, ¹⁵ though there is nothing to prevent a tutor from contracting in an open and *bonâ-fide* manner with his co-tutors as representing the minor, ¹⁶ or even from purchasing from them immovable property belonging to the minor. ¹⁷

Where there are several co-tutors, the authority of all is not necessarily required, unless the testator, by whom they were appointed, has expressly otherwise provided, or unless some of the tutors are opposed to

¹⁰ *Gericke v. Keyter*, 9 Buch. 147;
Nangle v. Mitchell, 18 E. D. C. 56.

¹¹ Voet, 27 : 9 : 13.

¹² Voet, 26 : 8 : 4.

¹³ Voet, 26 : 8 : 3, 4.

¹⁴ Voet, 26 : 8 : 5.

¹⁵ Voet, 26 : 8 : 6; 27 : 4 : 1.

¹⁶ Voet, 26 : 8 : 6.

¹⁷ *Louw v. Hofmeyer*, 2 Buch. 290;
Voet, 18 : 1 : 9.

and prohibit an act which the rest are prepared to authorize.¹⁸

A tutor who refuses his authority to a transaction which is for the benefit of the minor may be compelled by order of Court to give it.¹⁹

The same rules as above laid down with respect to minors will *cæteris paribus* apply also to wards of full age. Thus a person who has been declared a prodigal cannot alienate his own property nor bind himself by contract without the consent of his guardian,²⁰ though he may bind the other contracting party to himself whenever it is for his benefit.²¹

Contracts entered into by lunatics are null and void, even though they may not have been placed under curatorship.²² But an order of Court declaring a person of unsound mind is not a judgment *in rem*, but operates merely so as to create a rebuttable presumption that he is a lunatic, and consequently a contract voluntarily entered into by such a person will be valid, if made during a lucid interval.²³

CHAPTER XLIV.

THE RIGHTS, POWERS, AND DUTIES OF GUARDIANS.

THE powers, rights, privileges, duties, and obligations of tutors testamentary or dative, except in so far as is otherwise provided by Ordinance No. 105 of 1833,

¹⁸ Voet, 26: 8: 7.

¹⁹ Voet, 26: 8: 8.

²⁰ Voet, 27: 10: 7.

²¹ Voet, 27: 10: 9.

²² Voet, 27: 10: 7.

²³ *Prinsloo's Curators bonis v. Crafford and Prinsloo*, (1905) T. S. 669.

continue in all respects the same as those previously attached to tutors testamentary ; and the same is the case with respect to curators nominate or dative, at least in so far as relates to the particular estates or property which has been placed under their guardianship.¹ The same laws as previously also continue in force with respect to the rights, privileges, remedies, and obligations of minors and wards generally, and with respect to the rights of action of wards against guardians and guardians against wards.² The law with respect to curators *bonis* has not been altered by Ordinance No. 105.³ They generally receive special directions from the Court with respect to their curatorship, but in other respects their duties are analogous to those of curators dative, except in so far as their powers are limited by the temporary nature of their appointment.⁴

Before entering upon the administration of their wards' property, tutors and curators dative are bound to find security to the satisfaction of the Master for the due and faithful administration of such property ;⁵ but from this duty tutors testamentary and curators nominate are exempted, though the Court may in certain cases order that no letters of confirmation shall be granted to them, until security has been given by them.⁶

Within eight weeks from the date of their entering upon their office, all tutors whether testamentary or dative, and all curators whether nominate or dative, are bound to make a true and correct inventory of all property belonging to the estates of persons under

¹ Ord. 105, sec. 21 ; G. 1 : 11 : 5.

² Ord. 105, sec. 23.

³ Ord. 105, sec. 15.

⁴ Voet, 42 : 7 : 5 ; 37 : 9 : 2.

⁵ Ord. 105, sec. 16.

⁶ Ord. 105, sec. 5.

their guardianship, and they are also bound to make additional inventories from time to time whenever required, and to transmit all such inventories to the Master.⁷ The inventories may be transmitted sealed up, whenever such a course has been authorized by the person appointing the tutor or curator, either in the deed of appointment or in some other deed duly executed, or if the guardian is the survivor of two spouses who has been appointed by the first-dying spouse tutor of their minor children and administrator or *boedelhouder* of the joint estate during the minority of the children ;⁸ but the duty of framing an inventory cannot be dispensed with altogether.⁹ Any tutor or curator who, without any lawful and sufficient excuse, fails to make up and transmit such inventories shall be liable to be removed from his guardianship,¹⁰ and to pay all the costs incurred as well with reference to his own appointment as to that of his successor,¹¹ and also to make good any loss that may result from such failure.¹²

Where a guardian has by mistake inserted anything in an inventory which does not really belong to his ward or to the estate under his care, he may claim to have the same removed therefrom.¹³

A guardian has further to transmit to the Master a list of all persons indebted to the estate by virtue of any bond or other written instrument, and of all sureties for such debtors.¹⁴

The guardianship of a tutor extends to both the

⁷ Ord. 105, secs. 18-20; Voet, 26 : 7 : 3; G. 1 : 9 : 3, 8; V. D. K., Th. 139.

⁸ Ord. 105, sec. 18; Voet, 26 : 7 : 4. Sealed inventories shall not be liable to be opened except by order of the Court or a Judge upon sufficient cause for so doing being shown by

the Master (Ord. 105, sec. 18).

⁹ Voet, 26 : 7 : 4.

¹⁰ Voet, 26 : 7 : 5.

¹¹ Ord. 105, sec. 19.

¹² Voet, 26 : 7 : 5.

¹³ *Ibid.*

¹⁴ Ord. 105, sec. 18.

person and property of his ward, but not so that of a curator, except in so far as such power and authority have been specially given and committed to him by the Court or a Judge thereof.¹⁵

A tutor is bound to take immediate steps to provide for the maintenance and education of his ward in accordance with the rank and station of the latter, and in conformity with the directions of the father, if he has left any, or, in the absence of instructions from the father, in conformity with those of the mother, unless there are special reasons to the contrary, in which case the tutor may apply to the Court for directions.¹⁶ In the absence of any directions a tutor must use his own discretion, but in his expenditure should not exceed the amount of the ward's income,¹⁷ and should not even expend that unless required.¹⁸ The Court, however, will under certain circumstances and for special reasons allow an amount in excess of the annual income, and to be raised out of the capital of the ward, to be spent upon maintenance and education, if it is manifestly for the benefit of the minor.¹⁹ In case of emergency a Judge may make a temporary order providing for the maintenance and education and the charge and custody of the person of the minor, pending a final order by the Court itself.²⁰

The duties of a curator appointed to the person of

¹⁵ Ord. 105, sec. 21; *Eksteen v. Eksteen's Executors*, 4 S. C. 16; V. D. L. 100.

¹⁶ Ord. 105, sec. 23; Voet, 26: 7: 1, 6; 27: 2: 1, 2, 4; G. 1: 9: 9. Where the amount to the credit of the minor in the Guardian Fund is not more than £100, the Master may himself apply it to the maintenance of the minor.

¹⁷ *Prince v. Dieleman*, 1 Menzies, 435,

¹⁸ *In re Trueman*, 3 Menzies, 76; Voet, 27: 2: 2.

¹⁹ *Prince v. Dieleman*, 1 Menzies, 435; *In re Fehrser*, 3 Menzies, 74; *In re Robinson*, 4 S. C. 143; *In re De Villiers*, 22 S. C. 254; *In re Kemper*, 1 Cape Times, 64; *In re Russouw*, 1 Cape Times, 80; *In re Glynn*, 15 S. C. 28; *Jones and others v. Executors of Jones*, 8 E. D. C. 8; Voet, 27: 2: 2; 27: 4: 5.

²⁰ Ord. 105, sec. 23.

a lunatic are analogous to those of a tutor to a minor; namely, to provide for the necessities and maintenance of the lunatic.²¹ He will not, however, have any authority over the wife or children of the lunatic.²²

The guardian is bound, immediately after taking out letters of administration, to take possession of all the property belonging to his ward or to the estate under his guardianship, and to administer it to the best advantage; and, if he fail to do so, he will be liable in damages for any loss due to any fraud or negligence on his part.²³ He will not, however, be responsible for unforeseen accident.²⁴

He may validly enter into contracts on behalf of his ward, and may even make a compromise on his behalf.²⁵ But he is not entitled to make a donation in his ward's name or out of his ward's property, and may therefore not remit a debt due to the ward, even in favour of the ward's father or with his consent, nor may he allow the ward's father any privilege over other debtors,²⁶ though he may allow the ward's parents suitable maintenance, if they have no other means of subsistence.²⁷

For the delicts of his guardian the ward will not be liable, unless he has benefited thereby,²⁸ nor will he be liable for a loan (*mutuum*) raised by his guardian on his behalf unless the money has actually been spent for his benefit.²⁹

A tutor testamentary and a curator nominate are

²¹ Voet, 27 : 10 : 4.

²² Voet, 27 ; 10 : 10 ; 23 : 2 : 48.

²³ *Munnik v. Neethling*, 3 Menzies, 80 ; *Loedolff v. Orphan Chamber*, 1 Menzies, 486 ; *Brink's Curator v. Brink's Trustee*, 5 Searle, 344 ; Ord. 105, sec. 22 ; Voet, 26 : 7 : 1, 4, 7, 8, 9, 14 ; 27 : 3 : 8, 9, 12, 14 ; G. 3 : 26 : 8 ; V. D. L. 101 ; V. L., vol. 1,

p. 138.

²⁴ Voet, 27 : 3 : 15.

²⁵ Voet, 26 : 7 : 13 ; 26 : 9 : 4.

²⁶ *Munnik v. Neethling*, 3 Menzies, 80 ; Voet, 26 : 7 : 6 ; 27 : 9 : 3 ; 26 : 9 : 4 ; G. 3 : 1 : 30.

²⁷ Voet, 26 : 7 : 6.

²⁸ G. 3 : 1 : 30.

²⁹ Voet, 12 : 1 : 12.

bound to carry out all the directions given by the person who appointed them, provided the same are lawful and not manifestly in opposition to the interests of the minor.³⁰ Consequently, where a deceased father was a merchant, and has directed that his business is to be continued for the benefit of his children by the tutor testamentary, the latter will not only be justified, but will be bound to continue the business;³¹ but he cannot of his own motion and without any express direction to that effect commit the ward's property to the risks and chances of a doubtful business, and will be bound as soon as possible to withdraw such property from any doubtful transaction in which it may be involved.³²

For the purpose of the beneficial administration of his guardianship,³³ a guardian may sell the movable property belonging to his ward or to the estate under his care, but such sale should as a rule take place by public auction,³⁴ though a private sale will not necessarily be void, provided it takes place in an open and *bonâ fide* manner.³⁵ There is nothing also to prevent a guardian from purchasing property belonging to his ward at such public sale, or even privately from a coguardian.³⁶

No guardian, however, is entitled to sell, alienate, or mortgage any immovable property under his charge except with the leave and authority of the Court,³⁷ or

³⁰ Ord. 105, sec. 21; Voet, 26: 7: 14.

³¹ Voet, 26: 7: 11.

³² Voet, 26: 7: 11, 13.

³³ Voet, 26: 7: 13; 23: 5: 4.

³⁴ G. 1: 8: 5; R. Obs., pt. 2, obs. 13; V. L., vol. 1, p. 136.

³⁵ Voet, 27: 9: 1.

³⁶ Voet, 18: 1: 9.

³⁷ Ord. 105, sec. 24; *In re Pienaar*,

3 Buch. 103; *Van Rooyen v. McColl*, 3 S. C. 284; *Wolff v. Solomon's Trustees*, 12 S. C. 48; *In re Brown*, 7 S. C. 237; *Trollip v. Harper*, 3 E. D. C. 240; *In re Gerd's*, 12 S. C. 141; *Ex parte Potgieter*, 1 Off. Rep. 21; *In re Roselt v. Ingles*, 1 Kotze, 13; *Re Prinsloo and Grobler*, (1902) T. S. 230; *Ex parte Strydom*, (1903) T. S. 377; *Ex parte Wolmarans*,

unless the person by whom the guardian (if tutor testamentary or curator nominate) was appointed has given instructions for such sale, alienation, or mortgage.³⁸ So much is this the case that where a guardian has sold immovable property without the leave of the Court, and therefore without right, he may himself sue for the recovery of the same on behalf of his ward.³⁹

Leave will only be granted by the Court after full inquiry, and provided the alienation be necessary for the payment of the debts or for the maintenance of the minor, or be otherwise for his manifest benefit and advantage;⁴⁰ and, in order to satisfy the Court on these points, the rule is that, before applications are presented to the Court, they have to be submitted to the Master for report.⁴¹ A bare statement that money is required for certain purposes will not be sufficient. The Court will have to be satisfied that the money cannot be raised more advantageously in some other way.⁴²

Leave will, however, sometimes be granted *ex post facto* by way of ratification of an alienation originally made without leave.⁴³

Any alienation of immovable property made without the leave of the Court is null and void,⁴⁴ though in a case reported in the Cape Law Journal⁴⁵ it was

(1904) T. S. 38; *De Villiers, N. O., v. Lay*, 3 S. A. R. 49; Voet, 27: 9: 1-4; G. 1: 8: 6; V. D. K., Th. 130; V. L., vol. 1, p. 135. In former times, when the practice of *venia ætatis* was still in use amongst us, the leave of the Court was required even when a minor had obtained *venia ætatis* (Voet, 27: 9: 16).

³⁸ Ord. 105, sec. 24; Voet, 27: 9: 12.

³⁹ Voet, 6: 1: 19.

⁴⁰ *In re Emms*, 6 E. D. C. 204; *In re Thomas*, *ibid.* 206; *Flemmer v.*

Venter, 17 S. C. 435; Voet, 23: 2 63; 27: 9: 6, 8; G. 1: 8: 6.

⁴¹ *Re Minor Pretorius*, 16 S. C. 324.

⁴² Voet, 27: 9: 7. The usual practice of the Court in the case of applications for leave is first to refer the matter to the Master for inquiry and report.

⁴³ *Flemmer v. Venter*, 17 S. C. 435; Voet, 27: 9: 11.

⁴⁴ Voet, 27: 9: 9, 12.

⁴⁵ *McCabe v. Staples*, 1 Cape L. J. 284.

apparently decided that a bond over a minor's property, passed without the leave of the Court, will not be *ipso facto* null and void, but the Court will inquire whether the execution of the bond was for the minor's benefit, and, if so, the bond will not be set aside.⁴⁶ Provisional sentence, however, will not be granted on such a bond.⁴⁷

An alienation which was null and void in the first instance may become valid afterwards, if ratified by the ward upon his attaining majority, and this may be done either expressly or tacitly even against the wish of the other contracting party.⁴⁸ It will also become valid if the tutor becomes heir to the ward or the ward to the tutor.⁴⁹

Tutors dative and curators dative and *bonis* are bound to pay over to the Master all moneys belonging to the person or estate under their guardianship as soon as the same comes into their hands, except in so far as it may be required for the immediate payment of debts or for the maintenance of their wards.⁵⁰

Tutors testamentary and curators nominate, however, are not bound to do this, but may do so, unless forbidden by the person who appointed them;⁵¹ but, if they do not do so, they are bound within a reasonable time to invest the ward's money, except in so far as it may be required for immediate necessary expenditure, in land, or to put the same out at interest on good security.⁵² Upon failure to do so, they will themselves become liable to pay interest at the current rate upon the money lying idle.⁵³ But if instead of allowing the

⁴⁶ Voet, 27: 9: 13.

⁴⁷ *Trollip v. Harper*, 3 E. D. C. 240.

⁴⁸ Voet, 27: 9: 14.

⁴⁹ *Ibid.*

⁵⁰ Ord. 105, sec. 25; *Re Du Plessis*,

3 Cape L. J. 262; Voet, 26: 7: 10.

⁵¹ Ord. 105, sec. 26.

⁵² Voet, 26: 7: 9, 10; G. 1: 9: 10; V. L., vol. 1, p. 134.

⁵³ Voet, 26: 7: 9, 10.

money to lie idle, they convert it to their own use, they will at once be liable for interest at the current rate.⁵⁴ There is nothing, however, to prevent a tutor from becoming his ward's debtor by borrowing the ward's money from a co-tutor in an open and *bond-fide* manner.⁵⁵

Investments and leases of a minor's property should be so regulated as to become due and be terminable upon the minor's coming of age.⁵⁶

Not the least part of a tutor's duty is to appear for his ward in Court,⁵⁷ whether as plaintiff or defendant, provided the ward has a good cause of action or defence; for if he rashly or wilfully institute or defend an action, he will be personally liable for the costs of such action. Consequently, if he wishes to take a doubtful case into Court, he would do well first to obtain the leave of the Court, because, if unsuccessful, he may be compelled to pay the costs *de bonis propriis*.⁵⁸

If a guardian has any lawsuit against his ward, a curator *ad litem* will have to be appointed to assist the ward in his action.⁵⁹

Every guardian, whether tutor testamentary or dative, or curator nominate or dative or *bonis*, is bound, subject to the penalty of forfeiting all his fees, to lodge an annual account of his administration with the Master, unless such account has, in the case of a tutor

⁵⁴ Voet, 26: 7: 9, 10; 27: 3: 8, 9; Schorer, Note 43.

⁵⁵ Voet, 26: 7: 9.

⁵⁶ G. 1: 9: 10; V. D. K., Th. 154; Voet, 19: 2: 9; R. Obs., pt. 3, obs. 15.

⁵⁷ In an action by guardians it is not necessary to join the ward as co-plaintiff (*Curator ad litem of Letterstedt v. Executors of Letterstedt*, 4 Buch. 42; but see *Day v. Gray*, 3 Menzies, 75). And an action in the

name of the ward "assisted by his guardian" will also be good (*Jackson v. Humphrey*, 4 Cape L. J. 234).

⁵⁸ *Prince v. Dieleman*, 1 Menzies, 437; *Ex parte Montmort*, 6 S. C. 118; *Standard Bank v. Jacobsohn's Trustee*, 16 S. C. 352; Voet, 26: 7: 12; 26: 9: 2; 27: 4: 4; G. 1: 8: 4; R. Obs., pt. 2, obs. 11.

⁵⁹ G. 1: 8: 4; R. Obs., pt. 2, obs. 12.

testamentary or curator nominate, been dispensed with by the person appointing such tutor or curator, or unless the tutor testamentary happens to be the survivor of two spouses whom the predeceasing spouse has appointed tutor to their minor children and administrator or *boedelhouder* of the joint estate during the minority of the children.⁶⁰ In addition to this, a final account will have to be rendered to the ward or his heirs at the termination of the guardianship, and the property belonging to the ward will have to be handed to the ward, and that together with the interest, if the guardian has been guilty of delay in rendering his account.⁶¹ Before such final account has been rendered, a guardian will not be released from his guardianship.⁶²

Though the duties of a guardian end, as a rule, with the termination of his guardianship, *e.g.*, by the majority of his ward, yet if any business connected with the guardianship, whether judicial or otherwise, has been commenced by him, which requires his assistance to bring it to a satisfactory completion, he will be bound to render such assistance, unless the final accounts have been rendered by him and accepted by the ward.⁶³

If property has been illegally alienated by the guardian, the ward will be entitled to a real action, or *rei vindicatio*, for the recovery of the same against the guardian or any other person who is in possession of the same.⁶⁴ But a *bonâ-fide* purchaser of such property may claim to retain the same until the purchase price paid by him to the guardian, or so much thereof as he can prove to have actually gone into the estate of the

⁶⁰ Ord. 105, sec. 38; Act 14, 1864, sec. 3; Act 11, 1873, sec. 2; *Executors of Oelofse v. Griffiths*, 7 S. C. 182.

⁶¹ Voet, 27 : 3 : 6, 8-11, 16; 23 : 2 :

63; V. D. K., Th. 159; V. D. L. 108.

⁶² *In re Clydesdale*, 1 Roscoe, 258.

⁶³ Voet, 26 : 7 : 15.

⁶⁴ Voet, 27 : 9 : 10.

ward, has been repaid to him, or he may even recover such amount by way of action after giving up the property. The burden of proving that the ward has had the benefit of the money will be upon the purchaser.⁶⁵

Wards also, whether they be minors or wards of full age, have a tacit hypothec upon the estates of their guardians, whether tutors or curators, and whether natural or appointed⁶⁶ (with the exception of assumed tutors⁶⁷ and curators nominate to minors⁶⁸), in security for the due administration of their property,⁶⁹ but not for a debt due by such guardian unconnected with such administration.⁷⁰ This hypothec, however, is only available for the security of what actually falls under the guardianship, and not in security of property, to which other special curators have been appointed.⁷¹

Such hypothec will be preferred to all special conventional hypothecs of a later date, but not to earlier ones.⁷² It will, however, only be in force for a period of three years, reckoned, in the case of minors, from the day on which they attain their majority, and in the case of other persons, from the day on which they cease to be under guardianship, unless, indeed, they happen to be absent from the Colony at those respective

⁶⁵ Voet, 27: 9: 10.

⁶⁶ *In re Lutgens*, 2 Menzies, 315.

⁶⁷ Act 5, 1861, sec. 8, sub-sec. 3.

⁶⁸ *Brink's Curator v. Brink's Trustee*, 5 Searle, 344.

⁶⁹ Act 5, 1861, sec. 3; *In re Hercules Sandenberg*, 2 Menzies, 353; *Brink's Trustees v. Van Reenan*, 5 Searle, 162; *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 130; *Minors Botes v. Trustee of Meere*, 12 S. C. 28; Voet, 23: 2: 63; 20: 2: 17; 27: 3: 1. Minors have no legal

hypothec on the estates of executors for losses occasioned by them in that capacity (*In re Minaar*, 3 Menzies, 71); nor are they entitled to any privilege on bonds in their favour passed by persons who are not their guardians (*In re Lond*, 1 Menzies, 483).

⁷⁰ *In re Liesching*, 2 Menzies, 329.

⁷¹ *In re Lutgens*,—*Neethling*, q.q., v. *Trustee of Lutgens*, 2 Menzies, 315.

⁷² *In re Bloemmestein*, 2 Menzies, 360.

dates, in which case the period will begin to run from the date of their return to the Colony ;⁷³ but in no case will the hypothec subsist for more than five years, whether the ward be absent or present.⁷⁴

The tacit hypothec will also cease if the guardian passes a bond in security of his administration, in such a way as to amount to a novation of the debt.⁷⁵

If the minor dies before attaining majority, the tacit hypothec passes to his heirs ;⁷⁶ and if a widow, who is the tutrix of her children by a first marriage, marries a second time in community of property, without having rendered accounts or settled with the children, the hypothec will extend even over the goods of the second husband.⁷⁷

In addition to the above remedies, the minor will further be entitled to a personal action against the guardian for an account and the recovery of the balance due thereon,⁷⁸ and for compensation for any loss due to his fraud or negligence.⁷⁹ This action may be brought by the ward himself upon the termination of the guardianship, or by his heirs or other legal representatives,⁸⁰ and will be prescribed in thirty years from the termination of the guardianship.⁸¹

Where there are several co-guardians, and one of them has been the administering guardian, the dormant guardians cannot be sued to make good the loss which has resulted from anything which the administering guardian has done, until the latter or his heirs and sureties have been excused, the dormant guardians

⁷³ Act 5, 1861, sec. 3; *Hull v. McMaster*, 1 Menzies, 483; *Naudé v. Naudé's Trustees*, 2 Buch. 166.

⁷⁴ Act 5, 1861, sec. 3.

⁷⁵ *In re Lutgens*, 2 Menzies, 315; Voet, 20: 2: 16.

⁷⁶ Voet, 27: 3: 4.

⁷⁷ Voet, 27: 3: 5.

⁷⁸ Voet, 27: 3: 2, 10.

⁷⁹ Voet, 27: 3: 5, 10, 12; V. D. L. 107.

⁸⁰ Voet, 27: 3: 4, 5.

⁸¹ Voet, 27: 3: 16.

being entitled to the benefit of excussion, and that whether the sole administration has been given to the administering guardian by private agreement between the guardians, or by the direction of the testator, or by order of Court.⁸² But with regard to losses occasioned by omissions, all the guardians are liable *in solidum*,⁸³ and, though they may claim the benefit of division as between themselves, are not entitled to the benefit of excussion.⁸⁴ The least act of administration, such as the signing of the liquidation account of the estate, renders the guardian who commits it an administering guardian, and deprives him of the benefit of excussion.⁸⁵ A tutor is also regarded as taking part in the administration who has given an express power to a co-tutor to administer the estate, or who has taken security from a co-tutor for the proper administration of the guardianship.⁸⁶

Where all the guardians have joined in the administration, each may be sued *in solidum* for the whole, but may claim the benefit of division, if at the date of the termination of the guardianship the other co-guardians were solvent, but have become insolvent since, any loss due to the failure of the minor to sue at that time falling upon the ward himself.⁸⁷ The same rule applies where the ward has, upon coming of age, released one of the guardians.⁸⁸

Where the guardianship has been divided by order of the Court or by direction of the testator,

⁸² *Niekerk v. Niekerk*, 1 Menzies, 452; *In re Liesching*, 2 Menzies, 329; Voet, 27: 8: 6; V. L., vol. 1, p. 139. See also *Brink v. Smuts*, 3 Menzies, 81, in which the liability of superintending guardians is discussed.

⁸³ Voet, 27: 8: 6.

⁸⁴ *Niekerk v. Niekerk*, 1 Menzies, 453.

⁸⁵ *Ibid.*

⁸⁶ Voet, 27: 8: 6.

⁸⁷ *Ibid.*

⁸⁸ *Niekerk v. Niekerk*, 1 Menzies, 454; Voet, 27: 8: 6.

each guardian will only be responsible for his share.⁸⁹

As between themselves, co-guardians have, without any cession of action, recourse against each other for contribution towards any amount for which they were jointly liable to the ward, but which one of them has paid *in solidum*.⁹⁰

One co-guardian will also without cession of action have a good action against another for the repayment of an amount of the ward's funds misappropriated by the latter, and which the former has had to pay; but, if he wishes to have the benefit of the minor's tacit hypothec, he must obtain a special cession of the minor's rights in that respect.⁹¹ Such cession of action a guardian may legally claim whenever he is entitled to have recourse against his co-guardians.⁹²

As a remuneration for their services tutors testamentary and dative and curators nominate and dative are entitled to a reasonable compensation to be assessed by the Master, subject to review by the Court.⁹³ In practice this remuneration has been fixed at 5 per cent. upon the annual interest of the ward's inheritance.⁹⁴ Any tutor or curator who fails to lodge his accounts with the Master, when bound to do so, forfeits all claim to remuneration.⁹⁵

The guardian is further entitled to claim a refund of all moneys necessarily expended by him on the ward's property or on his behalf.⁹⁶ Nor will it make any difference whether the ward has derived any

⁸⁹ Voet, 27 : 8 : 6.

⁹⁰ Voet, 27 : 4 : 9.

⁹¹ *Wolverans v. Cloete*, 3 Menzies, 74.

⁹² Voet, 27 : 4 : 9.

⁹³ Ord. 105, sec. 39; Voet, 27 : 4 : 12; *Executor of Oelofse v. Griffiths*,

7 S. C. 182.

⁹⁴ *Hiddingh v. Denysen and others*, 3 S. C. 442.

⁹⁵ Ord. 105, sec. 58; *Executors of Oelofse v. Griffiths*, 7 S. C. 182.

⁹⁶ Voet, 27 : 4 : 3; G. 3 : 26 : 10; V. D. L. 107.

benefit from the expenditure or not,⁹⁷ provided the guardian has acted *bonâ fide* and with due diligence.⁹⁸

He will also be entitled to be indemnified and released from all obligations incurred by him on account of his ward,⁹⁹ and to be compensated for all loss caused to him by the ward personally, or which is directly attributable to his guardianship, and which, but for such guardianship, would not have been sustained.¹⁰⁰

CHAPTER XLV.

OBLIGATIONS BETWEEN THE GUARDIAN AND WARD AND THIRD PARTIES.

WHERE a guardian has made a contract with a third party in the name of the ward or with respect to his property, whether with or without mentioning the ward's name, the latter will be entitled to sue and in his turn be liable to be sued upon such contract.¹ During the continuance of the guardianship, actions lying against the ward will have to be brought against the guardian in his capacity as such or against the ward assisted by the guardian; and, after its expiration, against the ward personally, the guardian being then released from all liability, unless he has taken personal responsibility upon himself.²

If the guardian has perpetrated a fraud against a third party, he will continue liable even after the

⁹⁷ G. 3 : 26 : 10.

⁹⁸ Voet, 27 : 4 : 4, 5.

⁹⁹ Voet, 27 : 3 : 2; 27 : 4 : 1, 2, 10, 13.

¹⁰⁰ Voet, 27 : 4 : 7.

¹ Voet, 26 : 9 : 1, 2; G. 1 : 8 : 2.

² Voet, 26 : 9 : 3; 27 : 4 : 10; C. 5 : 37 : 26.

termination of the guardianship, and he will also be liable, at least *in subsidium*, if he contracted in the name of his ward at a time when the latter was manifestly insolvent.³ Where a ward has been benefited by the fraud of his guardian, he will be liable to be sued to the extent to which he has been benefited.⁴

In case of doubt a guardian is presumed to have acted in his ward's name whenever he has contracted with respect to the ward's property, especially when the other contracting party was aware of the guardianship. It would be otherwise if he has contracted with respect to matters which might have reference either to himself or the ward, in which case he will be regarded as having acted for himself rather than the ward.⁵

CHAPTER XLVI.

THE TERMINATION OF GUARDIANSHIP.

GUARDIANSHIP terminates either by revocation of the letters of administration by the Master, or *ipso jure*, or by a decree of Court.

Letters of confirmation granted to a tutor dative may be revoked by the Master himself upon production to him of any valid deed appointing another person, who is qualified and willing to act, as tutor testamentary.¹

Letters of confirmation, again, granted to a tutor testamentary or curator nominate may be revoked by

³ Voet, 26 : 9 : 3.

⁴ Voet, 26 : 9 : 4.

⁵ Voet, 26 : 9 : 6.

¹ Ord. 105, sec. 10.

the Court upon proof that the deed, in respect of which such letters were granted, is void or has been revoked, either wholly or in so far as relates to the appointment of such tutor or curator.²

Guardianship terminates *ipso jure* :—

(1) Upon the death of the guardian or ward ;³ and where a ward has been absent from the Colony for a number of years without anything having been heard of him, he will be presumed to be dead, and the Court will order his estate to be administered and distributed amongst his heirs under security for restitution in case of his turning up at some future time.⁴

(2) Upon the majority of the ward, whether male or female, either by attaining the legal age of twenty-one years⁵ or marrying.⁶

Formerly a ward could also, upon his own application, and after consultation with the parents and next-of-kin, be declared of age by a judicial decree of *venia ætatis* before he had attained the legal age ;⁷ but this procedure, as stated above,⁸ has fallen into disuse amongst us.

Guardianship is dissolved indirectly by a decree of Court :—

(1) Upon the sequestration of the estate of the guardian, who is regarded as *ipso facto* removed from office as soon as the order for such sequestration is made in the case of a voluntary sequestration, and as soon as the sequestration is adjudged in the case of a compulsory sequestration.⁹

² Ord. 105, sec. 10.

³ Voet, 27 : 3 : 1 ; 27 : 7 : 4 ; G. 1 : 10 : 1.

⁴ *Ex parte Storey*, 3 E. D. C. 150 ; *In re Lavin*, 3 E. D. C. 435 ; *Re Kannemeyer*, 7 S. C. 322 ; G. 1 : 10 : 5 ; V. D. K., Th. 163 ; R. Obs., pt. 1,

obs. 16.

⁵ Ord. 62, 1829, sec. 1.

⁶ Voet, 23 : 2 : 17, 23, 40, 49 ; 27 : 10 : 15 ; G. 1 : 10 : 2.

⁷ G. 1 : 10 : 3.

⁸ Page 245, above.

⁹ Ord. 105, sec. 17. This was not

(2) Upon the sequestration of the ward's estate the guardianship terminates, at least so far as the property of the ward is concerned, such property vesting upon the insolvency first in the Master and afterwards in the Provisional and Permanent Trustee.¹¹

(3) Upon the guardian himself being placed under guardianship.¹¹

Guardianship terminates by direct decree of Court :—

(1) When a person who has been placed under curatorship as being of unsound mind is released from such curatorship by an order of Court, granted after due inquiry, declaring him to be restored to soundness of mind, releasing his person and property from curatorship, and discharging the curators;¹² but in such a case the Court will not require the same strictness of proof as it does for declaring a person to be of unsound mind.¹³

(2) By an order of Court releasing a prodigal from curatorship.¹⁴

(3) By an order releasing a guardian from his office at his own request, upon grounds which may appear to the Court to be satisfactory, such as poverty, ill-health, or old age rendering him unequal to the burdens of his office, change of domicile, or absence from the Colony interfering with the efficient administration of the guardianship.¹⁵ But in any case a guardian will not be released till he has filed his accounts.¹⁶

so formerly (see *De Villiers v. Stucke-
ris*, 1 Menzies, 377).

¹⁰ *In re Jones*, 5 E. D. C. 34.

¹¹ Voet, 26: 10: 2.

¹² *Steyn v. Curators of Wiese*, 3 Menzies, 98; *In re Kemp*, 3 Menzies, 101; *In re Hathgate*, 1 Roscoe, 50;

In re Clydesdale, 1 Roscoe, 258.

¹³ *Re Borchers*, 7 Buch. 72; *Re Cole*, 6 E. D. C. 221.

¹⁴ Voet, 27: 10: 7, 16.

¹⁵ Voet, 27: 1: 7.

¹⁶ *In re Clydesdale*, 1 Roscoe, 258. See also *In re McKenny*, 4 E. D. C. 41.

(4) By a decree removing the guardian¹⁷ on the grounds that he is unfit for his office, or that his continuance in the same will be prejudicial to the ward.¹⁸

The following are some of the grounds upon which a guardian will be removed from office :—

(a) If the appointment has been obtained by fraud or bribery.¹⁹

(b) Failure of a guardian to frame an inventory.²⁰

(c) Failure of a tutor dative or curator dative or *bonis* to pay over moneys, belonging to his ward or to the estate under his charge, to the Master, in terms of sec. 25 of Ordinance No. 105.²¹

(d) Fraud, negligence, or incompetency on the part of the guardian,²² or conduct calculated to be injurious to the ward, such as failure to provide maintenance for him, refusal to act in conjunction with a co-guardian, serious enmity towards the ward,²³ and failure to appear in Court for him.²⁴

(e) The existence of interests on the part of the guardian conflicting with those of the ward, in which case the guardian is either removed altogether, or only suspended for a time, according as the conflict of interest is permanent or only temporary.²⁵

(f) Corrupt morals or evil personal habits on the part of the guardian, from which danger is to be apprehended to the morals or the property of the ward.²⁶

¹⁷ The chief magistrates in the Native territories have no jurisdiction to remove guardians (*Noah v. M^hlanjola*, 5 S. C. 180).

¹⁸ Ord. 105, sec. 17; Voet, 26: 10: 2, 8; G. 1: 10: 4.

¹⁹ Voet, 26: 10: 2.

²⁰ Ord. 105, sec. 19; Voet, 26: 10: 2; 26: 7: 5.

²¹ Ord. 105, sec. 25.

²² Voet, 26: 10: 7; 27: 2: 3.

²³ Voet, 26: 10: 2; 27: 1: 8; 27: 2: 3.

²⁴ Voet, 26: 7: 2.

²⁵ Voet, 27: 1: 7; Ord. 105, secs. 14, 17.

²⁶ *Nettleton v. Kilpatrick*, 1 Roscoe, 190; Voet, 26: 1: 14; 26: 10: 2.

(g) The guardian becoming of unsound mind himself, or so prodigal in his own affairs as to require guardianship himself, or at any rate to make it dangerous for the ward to continue under his care.²⁷

(h) Absence from the Colony expected to be of such long duration as to be inconsistent with the due administration of the guardianship.²⁸

Where a mother has been appointed tutor to her minor children, her guardianship does not terminate *ipso jure* upon her entering upon a second marriage, but she will be liable to be removed by the Court, unless her first husband has expressly declared that she is to continue to be tutor even after her second marriage.²⁹

The tutorship of a father does not terminate upon his second marriage, nor does that of a testamentary tutor upon his marriage with his ward's mother.³⁰

An application to remove a guardian may be made by the Master or any other person who takes an interest in the ward.³¹

It is almost unnecessary to add that a guardian, though removed from office, will continue responsible for his past administration.³²

CHAPTER XLVII.

FICTITIOUS PERSONS OR CORPORATIONS.

BEFORE concluding the Law of Persons, a few words upon the subject of fictitious persons would not be

²⁷ Voet, 26: 10: 2.

²⁸ Voet, 26: 10: 7; 27: 1: 7;
27: 2: 3; *Re Du Preez*, (1902)
T. S. 103.

²⁹ *Greybe v. Wiid*, 3 Menzies, 73;

Voet, 26: 4: 4; G. 1: 7: 11;
Schorer, Note 33.

³⁰ Voet, 26: 4: 4.

³¹ Voet, 26: 10: 4.

³² Voet, 27: 3: 1.

wholly out of place. As was shown above, the term "person" is applied in the first instance to natural persons. In a more extended sense, however, it is applied to various legal entities which are capable of possessing legal rights and of being subject to legal duties. In this sense the estate of a deceased person is in itself a person, and the same may be said of an insolvent estate, for the rights and duties which belong or attach to such estates are not the rights and duties of the individual executor or trustee of such estates respectively, nor of any other existing natural person or persons, but of the legal entity which has stepped into the place of the deceased person or the insolvent respectively. Again, the Government of the country is a person, seeing that it is entitled to rights and may be subject to duties. But the most important class to which the term of fictitious or juristic person is applied is to be found in those aggregates of real or natural persons which are called "*corporations*" in English and "*universitates personarum*" in Roman and Roman-Dutch law. The term "corporation" will be here used not in its technical English law signification, but as being synonymous with the "*universitas personarum*" of our law, for, though in the main the general principles applicable to these two legal institutions agree, there are certain minor particulars, such as the necessity or otherwise of a corporate seal, in which they differ.

A corporation, or *universitas personarum*, then, in our law is a legal fiction or incorporeal abstraction, consisting, indeed, of a collection or aggregation of real or natural persons, but having in itself no existence in nature, and existing merely in contemplation of law.¹ Fictitious, however, though it be, it is endowed

¹ Noodt's Commentarius ad Digesta, 3: 4, pars. 1, 2.

by legislative authority with the capacity and power of acting and of acquiring and having rights, and is liable to legal duties and responsibilities, in the same way in most respects as a real human person.²

The special feature and characteristic of a corporation lies in the fact that, though it is composed of real persons, it is a legal entity quite distinct and separate from the persons composing it, having a *status* or capacity for rights quite distinct from theirs,³ acting for itself as a whole through its legally constituted representatives, acquiring rights for itself as a whole, incurring liabilities which will be binding on itself as a whole, and suing and being sued as a whole. It follows that the debts of a corporation are not the debts of the individual members, nor are the debts due to the corporation due to the individual members,⁴ nor can such members be sued upon such debts or themselves sue upon the same, unless, indeed, they have made themselves personally liable for the debts of the corporation, or unless the corporation has the power to bind its members personally,⁵ as is the case with corporations established with the object of gain and which have not taken advantage of the Limited Liability Act. Even in this latter case, however, the corporate funds and property alone are in the first instance liable for the debts of the corporation, the members being only liable to make good any deficiency after the assets of the corporation have been excused;⁶

² *Thornton and others v. Hugo, N. O., and others*, 5 E. D. C. 300; *Gifford v. Table Bay Dock and Breakwater Management Commission*, 4 Buch. 111.

³ Voet, 1: 8: 28; Noodt's Commentarius ad Digesta, 3: 4, par. 2.

⁴ *Coetzeestroom Co. v. Registrar of Deeds*, (1902) T. S. 221; *Lecomte v. W. & B. Syndicate of Madagascar*, (1905) T. S. 705; Noodt, 3: 4, par. 2; D. 3: 4: 7: 1.

⁵ Voet, 3: 4: 4.

⁶ *Ibid.*

but in that case they are the debtors of the corporation, and not of its creditors.

Another peculiarity of a corporation is that it is endowed with the capacity of perpetual succession, by which is meant not that it can never cease to exist, because it may very well die a fictitious or juridical death,⁷ but that it has a continuous identity,⁸ which is unaffected by and independent of the death of one or all of the real persons of which it was originally composed. Consequently it is possible for all but one of the original members of a corporation to die, and yet for the rights and capacities of the corporation itself, in the absence of any law to the contrary, to remain intact and undiminished, but concentrated in the surviving member; and also for all the original members to have been replaced by others, and yet for the corporation to remain the same.⁹

A corporation, when legally constituted, enjoys the same rights as a real person, except in so far as the capacity for such rights depends upon the possession of the human form. Subject to this exception, a corporation may possess and own all sorts of property, may enter into all sorts of contracts, may have inheritances and legacies and even usufructs, which are personal servitudes, left to it, and may sue and be sued in all kinds of actions.¹⁰

In all legal matters a corporation is represented by one or more officials, duly appointed for the purpose in terms of its constitution, articles of association, or other constating documents, in whose name or in its corporate name it will be able to sue or be sued.¹¹

⁷ Voet, 1: 8: 28.

⁸ Brice's *Ultra Vires*, 3rd. ed., p. 3.

⁹ Voet, 3: 4: 1; Noodt, 3: 4, par. 2.

¹⁰ Voet, 1: 8: 28; 3: 4: 2.

¹¹ Voet, 3: 4: 5, 7; Noodt, 3: 4, pars. 1, 3; *J. O. Smith & Co. v. Stewart*, 1 Buch. 48; *Paterson v.*

In order to be endowed with the full capacity of a legal person, including especially the right to sue and be sued in its corporate capacity, whether in its corporate name or through certain officials, a corporation can only be established by an Act of the Legislature,¹² that is to say, under our present Parliamentary institutions either directly or indirectly by an Act of Parliament.¹³

Corporations are of various kinds. In the first place they are either public or private.

Of public corporations, some are political or quasi-political on the one hand, or non-political on the other. Amongst quasi-political corporations may be mentioned Divisional Councils,¹⁴ Municipal Councils, whether established under special or general Ordinances or Acts of Parliament,¹⁵ and Village Boards of Management.¹⁶ Amongst non-political public corporations may be classed the various Harbour Boards,¹⁷ River Boards, and Irrigation Boards, under the Irrigation Act of 1906,¹⁸ and the University of the Cape of Good Hope.¹⁹

Of private corporations, some are commercial, that is, such as have gain or profit for their object, and

Pearson and others, 5 Buch. 45; *Standard Bank v. Russouw*, 5 Searle, 199; *Trustees of the International Diamond Mining Co. v. Webster*, 2 E. D. C. 78; *Dell v. Watson*, 1 H. C. 392; *Bank of Africa v. Rose-Innes Diamond Mining Co.*, 1 H. C. 425; *Donough and others v. Rushton and others*, 1 Menzies, 549; *Burgers v. Murray*, 1 Roscoe, 218; *Tudhope v. Somerset East Bank*, 1 Roscoe, 304; *Aling v. Bellevue Prospecting Syndicate*, 9 S. C. 34; *Haarhoff v. Watson*, 2 Off. Rep. 181; *Jacobs, N. O., v. Celliers*, 3 S. A. R. 6; *Sheba Tramway Co. v. Sheba Gold Mining Co.*, 3 S. A. R. 10.

¹² Voet, 3: 4: 3; Noodt, 3: 4, par. 2.

¹³ But see the remarks of Watermeyer, J., in the case of *Burgers v. Murray and others*, 1 Roscoe, 256.

¹⁴ Act 40, 1889, sec. 131.

¹⁵ Ord. 9, 1836, sec. 24; Act 45, 1882, sec. 5; Act 26, 1893, sec. 4; Act 23, 1880, sec. 3; Act 10, 1880, sec. 3; Act 23, 1869, sec. 3; Act 11, 1883; British Kaffrarian Ordinance, No. 9, 1864, sec. 3; Act 27, 1897, sec. 5; Act 39, 1879, sec. 3; Act 30, 1877, sec. 3.

¹⁶ Act 29, 1881, sec. 24.

¹⁷ Act 36, 1896, sec. 30.

¹⁸ Act 32, 1906, secs. 19 and 47.

¹⁹ Act 16, 1873, sec. 1.

others non-commercial, which have no such object in view.

Amongst non-commercial private corporations may be enumerated several of our large educational institutions or colleges,²⁰ some Chambers of Commerce,²¹ Hospitals,²² and Libraries,²³ the Trustees of the South African Museum,²⁴ and the Law Society of the Cape of Good Hope.²⁵ Friendly Societies also, provided they are duly registered, are, it is submitted, to all intents and purposes corporations.²⁶

Commercial corporations are joint-stock companies, that is to say, companies the capital of which is divided, or agreed to be divided, into shares which are transferable by the holders thereof without the express consent of the other shareholders.²⁷ These companies are either limited or unlimited, and may be incorporated either under special Ordinances or Acts of Parliament of their own, or by virtue of their being registered under the general "Companies Act."²⁸

A limited company is one the liability of the members of which is, by their registered memorandum of association or by the operation of any Act of Parliament, limited to the amount, if any, unpaid on the shares respectively held by them, whilst an unlimited company is one formed on the principle of having no limit placed on the liability of its members.²⁹ The *status* of all such commercial corporations or companies, as

²⁰ Act 6, 1856, sec. 3; Act 20, 1887, sec. 1, and Act 11, 1891, sec. 4. See also Act 29, 1860, secs. 3, 29; Act 15, 1878, secs. 2, 17; and Act 9, 1881, secs. 1, 26, which, though not declaring the institutions, to which they refer, corporations, would seem to place them in the position of corporations.

²¹ Act 24, 1882; Act 21, 1891;

Act 8, 1894.

²² Act 5, 1856; Act 6, 1892.

²³ Act 20, 1864; Act 33, 1893.

²⁴ Act 17, 1857.

²⁵ Act 27, 1883.

²⁶ Act 5, 1892.

²⁷ Act 25, 1892, sec. 2.

²⁸ Act 25, 1892.

²⁹ Act 25, 1892, sec. 2.

also their rights and liabilities as regards their own members and the world at large, will depend upon the terms of their memorandum of association and of the Acts or Ordinances by which they have been incorporated or under which they are registered.

Besides the above-mentioned corporations properly so called, there are various bodies or associations which are somewhat analogous in their nature to corporations, but have, nevertheless, to be carefully distinguished from them, and are spoken of as "Voluntary Associations."

The main difference between a corporation and a voluntary association consists in this, that a corporation is a person with an existence entirely separate and distinct from the individuals composing it, such personality being based upon an Act of the Legislature, and being therefore bound to be recognized and accepted by all persons whomsoever; whereas a voluntary association has no existence separate or distinct from that of its individual members, and, not having any legislative sanction, is not a person in the eye of the law, and need not be recognized by any except those who have either by express or implied contract agreed and undertaken to do so. The Legislature has, however, afforded such associations certain facilities for holding immovable property by way of continuous succession through the trustees or other office-bearers for the time being of such associations,³⁰ and the Courts have recognized their right, at any rate as regards their own members and those who have by express or implied contract admitted such right, to sue and be sued through the officials, in whom the administration of their property or affairs is for the time being vested.

³⁰ Act 3, 1873.

It has also been decided that the members of such associations may adopt rules and regulations for enforcing discipline within their body, and may constitute a tribunal to determine whether such rules have been violated by any of its members or not, and what shall be the consequences of such violation, and that such rules and the decisions of such tribunals will be binding upon the members, providing the framing of such rules and the creation of such tribunals is contemplated by the constitution or articles of the association, and provided the tribunal has acted within the scope of the authority assigned to it.³¹ The decisions of such tribunals cannot, however, be enforced by themselves, but will have to be enforced through the ordinary Courts of law;³² and, if it is provided by the constitution or rules of the association that the decision of such tribunals shall be final, the Courts of law will, upon this being proved, enforce such decisions against all persons who have agreed to be members of the association or to be bound by such decisions, and they would do so, in the absence of fraud, without inquiring into the merits of such decision.³³

The most important of these voluntary associations are the various religious communities or churches, there being no established church in the Colony, nor any ecclesiastical corporations.

Of these religious bodies, the Dutch Reformed is the only one the regulation of the internal affairs of which has been made the subject of positive legislation, but the enactment referred to,³⁴ whilst recognizing the

³¹ *Long v. The Bishop of Cape Town*, 4 Searle, 176; *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 36. See also *Nederduitsche Hervormde Church v. Nederduitsche and Gereformeerde Church*, 10 Cape L. J. 335.

³² *Long v. The Bishop of Cape Town*, 4 Searle, 175; *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 33.

³³ *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 49.

³⁴ Ord. 7, 1843.

existence of that Church under the corporate name of the "Dutch Reformed Church in South Africa," and giving it the right to frame rules and regulations for the government of the Church through its General Assembly or Synod, and to exercise its discipline and government through certain Church Courts, as well as the capacity to sue and be sued in the name of the persons in whom the administration of its property is vested, expressly declares that the rules and regulations so enacted shall have no direct or inherent power to affect in any way the persons or properties of any persons whomsoever, but shall be regarded in law as the rules and regulations of a merely *voluntary association*, and capable of affecting the person or properties of such persons only as have subscribed, agreed to, adopted, or recognized them in such a manner as to be bound by them by virtue of the ordinary legal principle applicable to cases of express or implied contract.³⁵ It has consequently been decided that the Dutch Reformed Church is a purely voluntary association, not differing in this respect from any other religious community in this Colony, except in so far as certain leading principles are by the above statute laid down for its government, which is not the case with any other denomination.³⁶

The position of the Church of England in South Africa and of the South African Bishoprics has undergone several vicissitudes. The Bishopric of Cape Town was originally established by letters patent, issued on June 25, 1847, which expressly appointed the Bishop of Cape Town to be a body corporate and a perpetual

³⁵ Ord. 7, 1843, sec. 8.

³⁶ *Burgers v. Murray and others*, 1 Roscoe, 258, but more fully reported in a separate pamphlet published by J. C. Juta, Cape Town, in 1865; *Kotze v. Murray*, 5 Searle,

39; *Loedolff and Smuts v. Murray and Louw*, 4 Searle, 86. See also *Nederduitsche Hervormde Congregation of Standerton v. Nederduitsche Hervormde or Gereformeerde Congregation of Standerton*, Hertzog, p. 69.

corporation, and to have perpetual succession, and, as these letters patent were granted before the existence of representative institutions in this Colony, it is clear that a corporation in the strict English law sense of the term was thereby created. The first Bishop of Cape Town resigned his see in 1853, with the object of having it subdivided; and three new Bishoprics, namely, those of Cape Town, Grahamstown, and Natal, were thereupon created by letters patent, purporting to constitute each of the three Bishops a corporation, just as the Bishop of Cape Town had been previously. This, however, was done after separate constitutional governments had been granted to the Colonies of the Cape of Good Hope and Natal respectively, and when, therefore, there had ceased to be any power in the Crown, by virtue merely of its prerogative unsupported by any statute, to create any corporation whose *status*, rights, and authority those Colonies could be required to recognize.³⁷ Though the Bishops therefore continued to have such ecclesiastical powers as required no local legislative sanction, they ceased to have those corporate powers for which such sanction was essential.³⁸ This position was further accentuated when the Crown ceased, as it did after 1853, to grant letters patent to South African Bishops, and more especially when the "Church of the Province of South Africa" separated itself at the Provincial Synod of 1870 from the Church of England and established itself as a separate church.³⁹ The Church of the Province of South Africa is now,

³⁷ *In re Colenso, Bishop of Natal*, 3 Moore's P. C. C., N. S., 148.

³⁸ *Bishop of Cape Town v. Bishop of Natal*, 6 Moore's P. C. C., N. S., 203; *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 1; *Long v. Bishop of*

Cape Town, 4 Searle, 175; *In re Bishop of Natal*, 3 Moore's P. C. C., N. S., 115.

³⁹ *Merriman v. Williams*, Foord, 135.

therefore, merely a voluntary association, constituted and subsisting by mutual agreement,⁴⁰ and in the same position as the Presbyterians, Independents, Wesleyans, Baptists, or any other religious body in this Colony whose constitution has not been ratified by Act of Parliament, and will therefore have no binding effect, except upon its own members and such persons as have either expressly or impliedly subjected themselves to its jurisdiction.⁴¹

In the same way even the various Mohammedan congregations or mosques have been recognized by the Courts as voluntary associations, they having been allowed to sue and be sued through their office-bearers or representatives, that is to say, through their Imaum or High Priest, and the Gatieb, Billals, Marabouts, and other office-bearers in the mosque, and the Courts have undertaken to decide disputes arising amongst them according to the Mohammedan law prevailing in Turkey, varied and modified, as it has been, by the usages and customs prevailing amongst the Mohammedan congregations in the Colony.⁴²

Another kind of voluntary association may be found in the various kinds of clubs organized for social and other purposes, which are neither partnerships on the one hand, nor corporations on the other.⁴³

⁴⁰ *Merriman v. Williams*, Foord, 135; *Long v. Bishop of Cape Town*, 4 Searle, 175; *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 1.

⁴¹ *Bishop of Natal v. Gladstone*, L. R., 3 Eq. 36, 43.

⁴² *Jan and others v. Ismael and others*, 5 Searle, 102; *Du Toit and others v. Domingo*, 14 S. C. 126, *Imaum Gasiep v. Salie and another*; 1 Cape Times, 137; *Omar Raffie*

and others v. Behardien Jappie and Dout Mallick, 6 E. D. C. 169; *Hessen and others v. Daout*, 5 H. C. 214; *Doobie and others v. Salie and others*, 17 S. C. 552.

⁴³ *Re The Cape Town Club*, 19 S. C. 420; *White, Ryan and Co. v. Hilliard*, 20 S. C. 334; *Ehrlich v. Johannesburg Turf Club*, (1905) T. S. 677.

APPENDIX I.

EXTRACT FROM THE POLITICAL ORDINANCE OF HOLLAND, APRIL 1, 1580,¹ COMPRISING THE WHOLE OF THE REGULATION OF MARRIAGE, ITS CELEBRATION AND REGISTRATION, THE PROCLAMATION OF BANNES, THE FORBIDDEN DEGREES OF CONSANGUINITY AND AFFINITY, ADULTERY, ETC.

1. FIRST, as regards the marriage state, in order to provide against the irregularities which daily are committed more and more in the cohabitation of various persons, and in order to lay down such rule and order with respect to the same that every one may be satisfied in his conscience and belief, and in order that property and inheritances may, without difficulty or law-suits, devolve on those who are entitled thereto :

2. From henceforth all persons not related to each other in the degrees of consanguinity or affinity hereinafter declared to be prohibited of whatever state, condition, disposition, or sect they be, who at the date of the proclamation of these presents shall be living together and cohabiting as married persons, as well as all others who in church or before any public functionaries have entered into living together and cohabitation as married people, shall be held, regarded, and reputed by every one, as they are held, regarded, and reputed by these presents, as married people in every respect as if they had publicly pledged their troth and made it known before the Magistrates, Ministers of Religion, or other public functionaries, unless they or any of them not having pledged their faith or made it known before the Magistrates or Ministers of Religion feel themselves aggrieved thereby, which persons shall be bound within the

¹ 3 Groot Placaat-boek, col. 502.

period of three months after the proclamation of these presents to appear before the Magistrate of their place of residence and make known their objection, in order that the same may be noted and action taken upon the same as is fitting: It being well understood that those who have not pledged their troth as aforesaid before the Magistrates or Ministers of Religion, and nevertheless desire to continue in the aforesaid living together and cohabitation as married people, shall be at liberty and allowed, as by these presents they are at liberty and allowed, before the expiration of the aforesaid three months, to make such antenuptial contracts as to them may seem meet. And, moreover, all those also shall be regarded as married persons who during the persecutions for the cause of religion throughout these lands have married each other and lived together as married people, whether within these lands or abroad, although they have not made known their marriage in church in consequence of difference in religion, and notwithstanding that some of these have died, all just as if they had made known their marriage in church at the time when they married each other and began to live together.

3. And those who, after the publication of these presents, shall wish to enter upon a marriage, shall be bound to appear before the Magistrate or Minister of Religion in the cities or places of their residence, and there apply for the granting to them of three Sunday or Market-day banns, to be proclaimed in the churches or in the Council Chamber or other places where justice is administered on three successive Sundays or Market-days: Which banns shall be granted or proclaimed in order that every one who wishes to advance any objection or obstacle, whether by reason of blood-relationship, affinity, or prior promise of marriage, by reason of which the marriage ought not to be proceeded with, may do so: Provided, however, that the said banns shall not be granted or proclaimed if those who apply for the same are minors, to wit, young men under twenty-five and young girls under twenty years, unless they exhibit to the Magistrate or Minister of Religion the consent of their parents or the survivor of these (if they have any): But if any young man or young girl, being over ¹ twenty-five or twenty years of age respectively, applies for

¹ Query, "Under."

the aforesaid Sunday banns, without producing any proof of their parents' consent, the aforesaid Magistrates and Ministers of Religion shall, before the proclamation of such banns, be bound to summon the parents of the applicant before them, and, in case the parents refuse or fail to appear within fourteen days after the service of the summons upon them, such refusal shall be held as consent, and the said Magistrate or Minister of Religion may then forthwith proceed with the proclamation of the banns, but if the parents appear and allege any reasons why they will not consent to the contemplated marriage, and cannot be persuaded thereto by the Magistrate or Minister of Religion, the aforesaid Magistrate or Minister of Religion shall not be allowed to marry such young people before they have been allowed to do so by order of the Council of the Magistrates after due inquiry into the matter. The aforesaid banns having been published, in case no lawful objections have been made to the same, the persons shall be married by the Magistrate or Minister of Religion according to the forms in use in the churches or which shall have been prescribed to the Magistrates for that purpose by the States. All persons who after the promulgation of these presents shall unite themselves together in cohabitation or living together as lawful spouses in any other way, shall for the first month that they cohabit or live together each forfeit fifty pounds of forty *grooten* to the pound, for the second month an additional penalty of one hundred pounds, and for the third month a penalty of two hundred pounds, to be appropriated to the Head-Official, the poor of the locality, and the informer, a third to each, and if they continue thereafter to live together they shall be banished from the territories of Holland and West Vriesland for the period of ten years, and further be mulcted in their goods according to the rank of the persons.

4. And whereas according to divine, natural, and civil law with regard to holy matrimony, as being an ordinance of God instituted for the honourable preservation and propagation of the human race, it is forbidden to contract marriage between persons related to each other within certain degrees of consanguinity or affinity, and whereas certain variance and uncertainty is found to exist with respect to the

calculation of such degrees, especially with respect to collateral relationship: The States have caused the forbidden degrees to be hereinafter set forth, in order that every one may so much the better be informed of the same and that no one may pretend ignorance, ordaining and declaring that no persons, of whatever rank, condition, or persuasion they may be, related to each other by blood or in affinity within the degrees hereinafter set forth may be joined together nor in any way marry each other, on pain not merely that the same shall be considered as invalid, but that they shall be punished in person and goods in accordance with the written laws enacted against persons guilty of incest.

5. In the first place, ascendants and descendants, to wit, parents and children, in the ascending and descending lines *ad infinitum*, may not marry.

6. So also not brothers and sisters, whether of the full or half blood.

7. In the third place, uncles may not marry their nieces, that is, their brother's or sister's children or grandchildren or descendants; nor may aunts marry their nephews, that is, their brother's or sister's sons or grandsons or descendants, both *ad infinitum*, inasmuch as uncles and aunts stand in the position of father and mother to their aforesaid nieces and nephews.

8. And in as far as regards the degrees of affinity, inasmuch as the bonds of marriage bring about such a community that man and wife are only one, it is also forbidden and interdicted for a man to marry any blood-relation of his deceased wife or for a woman to marry any blood-relation of her deceased husband, related to such wife or husband within the degrees set forth above, under the same penalty of nullity and punishment in person and property as aforesaid,—that is to say, no man may marry his daughter-in-law, that is, his son's surviving widow, nor the widow of his son's or daughter's son, and so on in descent, nor the widow of any of his descendants, as also no woman may marry her son-in-law, *i.e.*, the husband of her deceased daughter, nor the husband of her son's or daughter's daughter, nor in the same way any one who was the husband of any of her descendants.

9. In the same way no man may marry his stepdaughter,

that is, the daughter of his wife by a previous marriage, nor any descendant of such stepdaughter; as also no woman may marry her stepson, *i.e.*, the son of her deceased husband by a previous marriage, nor any descendant of such stepson.

10. So also no man may marry the surviving widow of his deceased brother, nor may any woman marry the husband of her deceased sister.

11. Besides this, a man may not marry the widow of his nephew, *i.e.*, the widow of his brother's or sister's son, nor the widow of any of his brother's or sister's descendants; as also no woman may marry the surviving husband of her niece, *i.e.*, the widower of her brother's or sister's daughter, nor the husband of any of her brother's or sister's grandchildren or descendants.

12. And whereas in the entering upon and contracting of the holy marriage state particular regard must be had that the same be done in all decency, and that all confusion of the above degrees (whereby great difficulties arise with respect to succession and otherwise) may be prevented: the aforesaid States ordain that in case any persons apply for the publication of their banns with the object of being married, who the Deputies of the Magistrates or the Ministers of Religion nevertheless think ought not, on the grounds of the aforesaid decency and in order to prevent a confusion in degrees, to be allowed to marry, then the aforesaid Deputies or the Minister of Religion may report the same to the authorities to be appointed for the purpose and suspend the proclamation of banns applied for, in order that after inquiry into the circumstances in the meanwhile the marriage may be allowed or forbidden by the authorities, as may be found to be in accordance with the divine or the civil law.

13. Declaring therefore by these presents as null and void and of no validity the marriages which have not been contracted and celebrated in the aforesaid manner, and that in case those who are related to each other in the aforesaid degrees of blood or affinity, hereafter take upon themselves to marry notwithstanding the aforesaid prohibitions, they shall be punished for the same without compromise or dissimulation with the penalties provided by divine and written laws as aforesaid against persons committing incest, without

any alteration being hereby made in the placaat published by his Imperial Majesty in the year 1540 with respect to the contracting of marriage by minors or the penalties therein provided.

14. And whereas the aforesaid States are also informed that adultery is allowed to go unhindered and unpunished in the aforesaid territories, inasmuch as the Officials and Magistrates do not do their duty against it as they ought, excusing themselves on the ground that in former times the respective officials used to take upon themselves the cognizance of the said abuses and misdeeds, without considering them of importance or to be punished otherwise than with light and small pecuniary fines, but whereas, nevertheless, such shameful sins arouse the wrath of God against the countries and peoples where and amongst whom they prevail and are left unpunished, of which the express word of God and all history afford many examples, and whereas also the annoyances, confusions, and evil example of adulterers have caused heathen Emperors and Kings to punish adulterers with death : Now therefore the aforesaid States, desiring to prevent such adulteries, have ordained and decreed, ordain and decree by these presents :

15. In the first place, if a married man shall in future commit adultery with an unmarried or married woman or an unmarried man with a married woman, such man shall, as infamous and perjured, forthwith forfeit his office and position if he holds any from the aforesaid States or in any of the towns of the aforesaid territories, and shall further be declared incapable of occupying any position or office in the said lands or towns. And in case such adultery is committed by a married man with a married woman, they shall over and above be banished from the aforesaid lands for the period of fifty years.

16. But in case the adultery is committed by a married man with an unmarried woman, the aforesaid man shall in addition to the aforesaid forfeiture of office be condemned for the first offence to a penalty of one hundred Caroli *gulden*, and if he thereafter offends again therein, to banishment for fifty years and a fine of two hundred *gulden* ; and the unmarried woman who has offended in this respect, shall be

condemned for the first offence to spare diet (bread and water) for the period of fourteen days, and if she be found to commit the same again, she shall be banished from the aforesaid territories for the period of fifty years.

17. If any unmarried man commits adultery with a married woman, the man shall be condemned to spare diet for the period of fourteen days and to a penalty of one hundred Caroli *gulden*; and if he repeats the offence, he shall be banished from the aforesaid territories for ever; and the woman who commits adultery with an unmarried man, shall be banished as aforesaid for the period of fifty years.

18. And all this without prejudice to any right which the offended party, whether husband or wife, may have against the adulterer as well for divorce as otherwise according to the law, it being also understood by these presents that all punishments and penalties decreed by the Imperial and the Civil laws with respect to the crimes of seduction, abduction, and incest, and such-like qualified whoring, shall continue in force.

APPENDIX II,

PERPETUAL EDICT OF THE EMPEROR CHARLES, DATED THE
4TH OF OCTOBER, 1540.¹

CHARLES by the grace of God Roman Emperor, . . . Count of Flanders, Artois, Burgundy, Count Palatine of Hainault, Holland, Zeeland, etc., etc. To all who may see this our present letter greeting: Whereas we have at present come into these our dominions, in order to make provision and to arrange that the same may be ruled and governed in good justice and policy under devotion to our Holy Mother Church. . . . So have we after ripe deliberation with the advice of our dear and beloved Lady and Sister, the Queen Dowager of Hungary, Bohemia, etc., our Regent and Governor throughout these our aforesaid territories, of the Knights of our Order, of the Heads and members of our Privy Council and of our Finances, ordained and decreed and of our own right judgment, will and absolute power ordain and decree by these presents as an Edict and perpetual law as follows :

* * * * *

6. And whereas many merchants take upon themselves to constitute in favour of their wives large dowers and excessive gifts and benefits out of their property, as well in consideration of marriage as to secure their property with their aforesaid wives and children, and afterwards are found unable to pay and satisfy their creditors—whereupon their wives and widows wish to be preferred before all creditors, to the great injury of the course of trade ; we will and ordain that the aforesaid wives, who hereafter shall contract marriage with

¹ Groot Placaat-boek, vol. 1, col. 311.

merchants, shall not be entitled to pretend to, to have or to receive any dower or any other benefit out of the property of their husbands, or to take part or share in the acquisitions made *stante matrimonio* by the husband,—even in cases where property has been actually transferred or pledged or specially mortgaged (*al waar't zoo dat zij ge-erft ofte beleend waren*)—until such time as all the creditors of their aforesaid husbands shall have been paid and satisfied, whom we will in this respect to be preferred before the aforesaid wives or widows, —saving to the latter their right of preference, to which they are entitled by reason of their marriage portion brought by them into the marriage or obtained by them through gift or succession from their friends and relatives.

* * * * *

17. And whereas daily many inconveniences are caused in our realm in consequence of secret marriages which are contracted between young people without the advice, counsel, or consent of their friends and relations on both sides, we, observing that according to the prescripts of the written law such marriages are not in accordance with honour and due obedience, and generally come to a bitter end, desire, ordain, and decree that, if any one shall take upon himself to solicit and induce any young girl of not more than twenty years, by means of promises or otherwise, to contract marriage with him, or shall in fact contract marriage with her without the consent of the father or mother of the said girl, or of the majority of the friends and relatives, if she has no father or mother, or of the judicial authorities of the place, such man shall at no time be entitled to take or receive any dowry or other benefit (whether by way of antenuptial contract or by the custom of the country, by testament, gift, transfer, cession, or otherwise, in any manner whatever) out of the goods which the said girl may leave behind, even though he may, after the marriage has been completed, have obtained the consent of the father and mother, of the aforesaid friends and guardians, or of the Court, of which we do not wish any notice to be taken in this particular. In the same way, if any girl or woman takes upon herself to marry a young man of not more than twenty-five years, without consent of father or mother, or of the next-of-kin or relations, or of the judicial authorities

of the place, such woman shall never be entitled to take or acquire any dowry or other benefit out of the goods which such man may leave behind, whether by way of antenuptial contract, or by the custom of the country, or by testament, gift, transfer, cession, or in any manner whatsoever, even though she may, after the consummation of the marriage, have obtained the consent of the father and mother, of the aforesaid friends and relatives, or of the judicial authorities, of which we do not wish that any notice shall be taken. Further, we forbid all our subjects to be present at, or to connive at or countenance such marriages contracted without the consent of the judicial authorities, or to receive, entertain, or lodge such married person in their houses, under a penalty of one hundred Caroli or other severe discretionary punishment. We forbid also all notaries to receive any marriage contract or other promise to enter into such a marriage, on pain of forfeiture of their office and besides of being punished at discretion. Commanding all our officers and fiscaals to take great care to have these Ordinances observed and upheld, and to have the contraveners of the same punished without favour or dissimulation.

APPENDIX III.

ORDINANCE ON PUBLIC AFFAIRS (*Policien*) IN HOLLAND, DATED THE 1ST OF APRIL, 1580.¹

To all those who may see these presents or hear them read : Notice is given by the Knighthood, Nobles, and Towns of Holland, representing the States of the said Province, that, considering that it is their office and duty to provide, by all proper means and ways, especially in the present state of the times, against all irregularities, abuses, and misunderstandings which may cause any difficulties, lawsuits, or disputes amongst the inhabitants and subjects of this Province, and the consequent unrest, partisanship, dissension, and disunion, to the prejudice not only of the common peace and prosperity, but also of the true service and honour of God Almighty ; and the aforesaid States finding that in fact daily complaints, lawsuits, confusion, and disputes occur and arise between the inhabitants and subjects of the aforesaid Province, because in the matter of marriage, inheritance, and succession, etc. etc., no uniform and fixed practice, rule or law, is laid down or observed, inasmuch as although provision has to a certain extent been made with reference to the aforesaid matters both by the Civil Law and by some old Ordinances and Placaats, nevertheless some of the said laws and Ordinances, whether by the introduction of certain evil customs or through lapse of time, have fallen into disuse and are not observed, whilst others require more accurate interpretation, explanation, re-enactment or enlargement, for the better maintenance of the public peace and the state of the Provinces, and the greater

¹ Groot Placaat-Boek, vol. 1, col. 329.

justice of the inhabitants of the same: the Knighthood, Nobles, Towns, and States aforesaid have consequently, with the advice of the presiding and other Councillors of Holland, Zealand, and Friesland, ordained and enacted as a perpetual edict, as they ordain and enact by these presents :

* * * * *

19. With respect to inheritances and successions, the States have repealed and abolished, as they repeal and abolish by these presents, all the Civil Law and the customs and usages in use in the aforesaid Territories and in the Countships of Holland and Friesland up to the present day with regard to successions *ab intestato* which come to one with respect to allodial, movable, and immovable property without any testamentary disposition or the execution of any last will. Ordaining and decreeing that from henceforth there shall be used and observed as a common law in the matter of the aforesaid successions, everywhere and in all places, as well in the walled towns as in the villages, and in the country districts in the said Province and in the Countships of Holland and Friesland, what follows :

20. In the first place, that in all successions the children and other descendants in the direct line shall succeed *ad infinitum* to their parents *per stirpes* and by representation.

21. That, the said descendants failing, the father and mother, being both still alive, shall succeed to their children universally and solely.

22. But the same, either both or one of them, failing, the brothers and sisters of the deceased and the children and grandchildren of the same by representation shall succeed to all the property.

23. It being well understood that half-brothers and sisters and their children and grandchildren, as also all other collateral relatives, related to the deceased on only one side, shall not succeed further than each with half a hand, and that according as they are related to the deceased by blood.

24. All descendants, father and mother, brothers and sisters, as well as their children, grandchildren, and other descendants failing, that then the uncles and aunts of the deceased and their children by representation *per stirpes* shall succeed.

25. Unless grandfather and grandmother of the one side

are both still alive, in which case they will be preferred, in the succession coming from the same side, to the uncles and aunts of the same side, as well as to their children, being the children and grandchildren of the said grandfather and grandmother, and nevertheless not brothers and sisters of the deceased.

26. No parents or other ascendants, in case the marriage is dissolved and one of the two spouses dead and only one alive, shall succeed to their children or other descendants.

27. The property of the deceased shall always go to and devolve upon the relations of the deceased upon the father's and mother's side, sharing and dividing the same in half, without regard being had to the fact that the deceased has left more of them on the father's than on the mother's side, or *vice versâ* on the mother's than the father's.

28. Representation amongst collaterals and collateral relatives and blood relations on either side shall not take place beyond brothers' and sisters' grandchildren and uncles' and aunts' children inclusive, and all further collateral relations, being most nearly connected with the deceased in degree and relationship, and being equally close, shall succeed in equal shares *per capita*, to the exclusion of all others more remote in degree or relationship.

29. Whenever any of the children have received from their parents any property or moneys as their portion or as a marriage gift or otherwise for the advancement of the said children in their trade or business or such like, and the said children afterwards wish to succeed to the property of their deceased parents jointly with their co-heirs, they shall first and foremost bring into the common estate whatever they have so received or enjoyed or the true value of the same, such as it was at the date of the gift, in case the property was given without any value being put upon it; but, in case a value was put upon it, they may insist upon collating such value, and, this having been done, the whole estate shall then be divided in equal shares, half and half between the surviving father or mother, on the one hand, and the deceased's heirs on the other, and the same shall also take place on the first, second, third, and following marriages. And what is provided above with respect to successions and collations shall take

place whenever nothing to the contrary is provided by testaments, antenuptial contracts, deeds executed at the Orphan Chamber, or by other dispositions or contracts.

* * * * *

Thus done, resolved and enacted by the States aforesaid at the Hague, and the Seal of the said States impressed hereon on the 1st of April, 1580, and by order of the States signed

C. DE RECHTERE.

APPENDIX IV.

DECLARATION OF THE STATES OF HOLLAND AND WEST FRIESLAND OF MAY 13, 1594, WITH RESPECT TO THE ORDINANCE ON SUCCESSIONS.¹

THAT the meaning and intention in laying down the order of succession was : that half brothers and sisters and the children and grandchildren of the same shall succeed by representation with half a hand, whenever the deceased has lost both father and mother. In such a way that then the full brothers, or their children or grandchildren by representation related to the deceased on both father's and mother's side, shall have one-half of the property, and that the other half shall be divided between them and the half brothers and sisters, or their children or grandchildren by representation, related to them on only one side. And that the said half brothers and sisters and the children and grandchildren of the same shall succeed by representation with a full hand, if the deceased has only lost that parent through whom the half brothers and sisters are related to him, and not otherwise or further. And that the same distinction shall be observed with respect to all further collaterals related on only one side, each in his respective degree.

That the descendants of brothers' and sisters' grandchildren related to the deceased in the fifth and further degrees shall be preferred in the succession to grandfathers and grandmothers and further ascendants, as well as to uncles and aunts, their children and grandchildren and further descendants of the same, and that *per capita* and not *per stirpes*. That not only

¹ Groot Placaat-Boek, vol. 1, col. 341.

the ascendants, the marriage being dissolved,² are excluded from the succession of the deceased, but also all those who are related to the deceased only through the same;³ and that with respect to this, the inheritance shall not be divided into two halves, to go to the father's and mother's side respectively, except when the deceased has lost both father and mother, and, when this is not the case, the same shall go as a whole to the side on which the deceased has lost a parent.

* * * * *

Thus done at the Hague the 13th of May, 1594. By order of the States,

Signed: C. DE RECHTERE.

² That is, by the death of one of the parents.

³ That is, the marriage.

APPENDIX V.

PRIVILEGE GRANTED BY THEIR HIGH MIGHTINESSES TO THE EAST INDIA COMPANY OF THESE PROVINCES, WITH RESPECT TO THE RIGHT OF SUCCESSION *ab intestato* IN THE EAST INDIES AND ON THE VOYAGE THERE AND BACK, DATED JAN. 10, 1661.¹

THE States-General of the United Netherlands to all who see these presents or hear them read, Greeting: Be it known that we, in accordance with the adopted report of the Heer Huygens and others of our Deputies, having considered and examined the Petition presented to us by or on behalf of the Directors of the East India Company of the aforesaid United Netherlands, to the effect that a fixed law should be introduced by us on the subject of the succession *ab intestato* to persons who happen to die in the East Indies or on the voyage there and back; and it being taken into consideration that we heretofore in the years 1629 and 1636 granted and ordained that the Political Ordinance promulgated in the year 1580 by the States of Holland and West Friesland as regards that Province should be followed in the territory conquered by the members of the West India Company in the West Indies and Brazil, and should there be accepted as the common law; and mature deliberation having followed thereupon, we have thought fit to grant, permit, and allow to the members of the said East India Company, as we do grant, permit and allow by these presents, that in the matter of succession *ab intestato*, and whatever depends thereupon, the aforesaid Political Ordinance shall have to be followed and observed in all lands and towns, and with respect to all individuals in the aforesaid Indies which are under the Dominion of the State of the United Netherlands, and the rule of the aforesaid Company, as also with respect to those on the voyage there and back, as and in the terms in which the same has been elucidated by the subsequent interpretation of the said States of Holland, dated May 13, 1594. But with this

¹ Groot Placaat-Boek, vol. 2, col. 2634.

understanding, that the marriage between the parents of the deceased being dissolved and only one of them, whether father or mother, being alive, such survivor, together with the brothers and sisters of the deceased, whether full or half, and the children and grandchildren of the same by representation, shall succeed to the whole inheritance of the deceased; that is to say, the surviving father or mother to one-half, and the brothers and sisters, their children and grandchildren, to the other half; it being well understood that in that case the half brothers and sisters and their children and grandchildren must be related to the deceased on the side of the deceased parent. And in case the deceased should happen to leave no brothers or sisters surviving, but does leave brothers' and sisters' children and grandchildren, that in that case the said children and grandchildren of the deceased's brother and sister shall in the same manner succeed by representation to one-half of the property left behind, together and concurrently with (*met ende nevens*) the surviving father or mother. And if there are no brothers or sisters, nor children nor grandchildren of the same, alive, that then the surviving father or mother shall succeed to all the property left by the deceased as a whole, and be preferred to all the collateral relations; all with this understanding, that in so far as there may be found in the inheritance of the deceased lands, houses, or other fixed and immovable property, there will have to be followed, with respect to these, the law and customs of the Provinces, Districts, and places where the said fixed and immovable property is situate. Requesting and desiring, also inviting, instructing, and commanding respectively each and all, as well in this country as in the Indies, and also upon the voyage, whom it may in any way concern, to allow the aforementioned East India Company and those under her control or rule as aforesaid, and all others to whom it is due, to use and enjoy now and for ever, peacefully and undisturbed, and without opposition to the contrary, the full effect of this our grant and privilege, on pain of incurring our highest indignation, inasmuch as we have thought that so it ought to be.

Given under our Great Seal and the signature of our Secretary at the Hague on the 10th of January, 1661.

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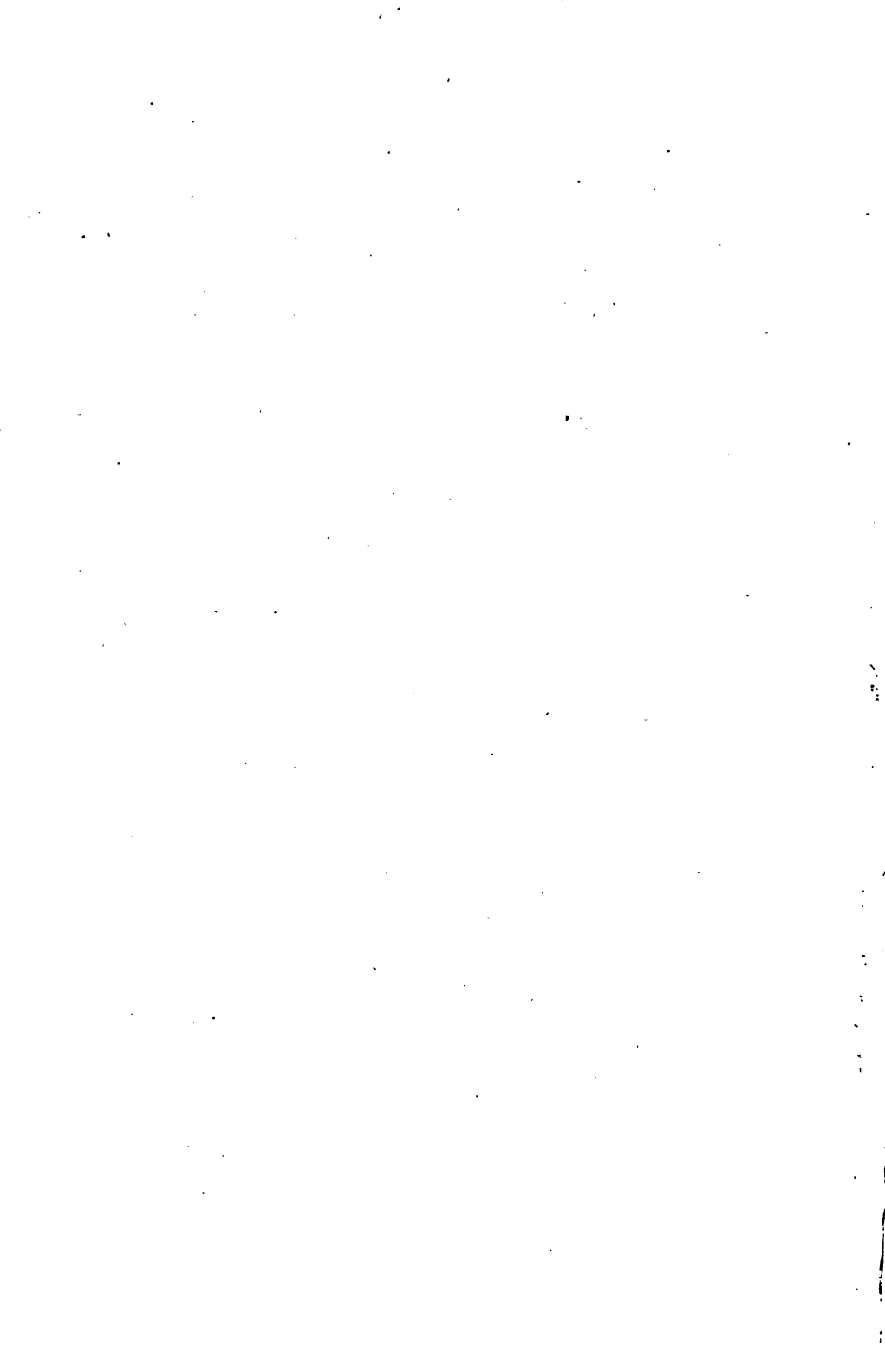
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the 1990s, the number of people in the world who are undernourished has increased from 250 million to 800 million (FAO 1996).

There is a growing awareness of the need to improve the nutritional status of the world's population. The World Bank (1992) has estimated that the cost of malnutrition to the world economy is \$100 billion per year. The World Health Organization (1992) has estimated that the cost of malnutrition to the world economy is \$100 billion per year. The World Bank (1992) has estimated that the cost of malnutrition to the world economy is \$100 billion per year.

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